IT IS SO ORDERED.

Dated: June 28, 2006

J. Vincent Aug, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re:	)	**Chapter 11**
	)	
EAGLEPICHER HOLDINGS, INC., *et al.*,	)	**Jointly Administered**
	)	**Case No. 05-12601**
Debtors.	)	
	)	**Judge J. Vincent Aug, Jr.**

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION

PREPARED BY:

Stephen D. Lerner (OH 0051284)
Scott A. Kane (OH 0068839)
P. Casey Coston (MI 49871)
Kenneth R. Craycraft, Jr. (OH 0074253)
SQUIRE, SANDERS & DEMPSEY L.L.P
312 Walnut Street, Suite 3500
Cincinnati, Ohio 45202
Telephone: 513.361.1200
Facsimile: 513.361.1201
E-mail: slerner@ssd.com, skane@ssd.com, ccoston@ssd.com, kcraycraft@ssd.com

ATTORNEYS FOR
DEBTORS AND DEBTORS-IN-POSSESSION

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

Page

Statutes

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re:	)	**Chapter 11**
	)	
EAGLEPICHER HOLDINGS, INC., *et al.*,	)	**Jointly Administered**
	)	**Case No. 05-12601**
Debtors.	)	
	)	**Judge J. Vincent Aug, Jr.**

DEBTORS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION

EaglePicher Holdings, Inc. ("Holdings") and certain of its affiliates, each a debtor[1] and debtor-in-possession in the above captioned cases (collectively, the "Debtors"), hereby submit these proposed findings of fact and conclusions of law (the "Findings of Fact and Conclusions of Law") with respect to the Debtors' Second Amended Joint Plan of Reorganization, dated May 31. 2006 (Doc. No. 2114) (as amended from time to time, the "Plan").[2] The Debtors filed the Plan to facilitate the transfer of substantially all their assets (the "Transferred Assets") and certain specified liabilities to a newly formed holding company ("New HoldCo") and various newly formed subsidiary operating companies (each a "NewCo," and collectively the "NewCos")), and the satisfaction of claims against the Debtors through the distribution of the consideration received on account of the Transferred Assets, among other things.

---

[1] The debtors are: EaglePicher Incorporated; EaglePicher Technologies, LLC; EaglePicher Pharmaceutical Services, LLC; EaglePicher Filtration & Minerals, Inc.; EaglePicher Automotive, Inc.; Daisy Parts, Inc.; and Carpenter Enterprises, Limited.

[2] All capitalized terms not defined herein shall have the meanings ascribed to them in the Plan or the Disclosure Statement in Support of Debtors' First Amended Joint Plan of Reorganization, dated March 2, 2006 (the "Disclosure Statement").

I. BACKGROUND FACTS REGARDING THE DEBTORS

A. Current Business Operations

1. Formerly headquartered in Phoenix, Arizona, Holdings is a majority-controlled subsidiary of Granaria Holdings, B.V. of the Netherlands, with domestic operations throughout the United States. The remaining Debtors are affiliates of Holdings. Debtor EaglePicher Incorporated is an Ohio corporation. The Debtors have recently moved their corporate headquarters to Detroit, Michigan. Upon consummation of the transactions contemplated by the Plan, New HoldCo will have its corporate headquarters in Detroit.

2. The Debtors are diversified manufacturers of advanced technology and industrial products that are used in automotive, defense, aerospace, telecommunications, medical implant devices, pharmaceutical services, nuclear energy, food and beverage, filtration and minerals and other industries. The Debtors have a long history of innovation in technology and engineering which has helped them to become a market leader in certain markets in which they compete.

3. The Debtors' operations consist of three businesses: Automotive, Filtration and Minerals, and Technologies. The businesses are further organized into seven operating segments (the "Segments"): (a) the Hillsdale Segment[3]; (b) the Wolverine Segment[4]; (c) the Defense and Space Power Segment; (d) the Commercial Power Solutions Segment; (e) the Specialty Materials Group Segment; (f) the Pharmaceutical Services Segment; and (g) the Filtration and Minerals Segment.[5]

---

[3] The business segment that includes the Hillsdale Debtors.

[4] The Wolverine business division is located within Debtor EPI.

[5] The operating segments do not correspond directly to individual Debtor entities. For example, the Hillsdale Segment is operated through the consolidated Hillsdale Debtors. The Wolverine Segment and the Commercial Power Solutions Segment are part of EPI (although the Commercial Power Solutions Segment is currently operated by EPT). The Defense and Space Power Segment and the Specialty Materials Group Segments are operated by EPT. The Pharmaceutical Services Segment is located within

4. Together, the Debtors employ about 2,600 people, approximately 44% of whom are union employees. Of the union employees, most are represented by the United Auto Workers, the United Steelworkers of America, or the International Brotherhood of Teamsters.

5. For the fiscal year ended November 30, 2005, the Debtors generated a combined net loss of approximately $41 million on approximately $670 million in net sales. As of November 30, 2004, the Debtors had approximately $570 million in assets and approximately $825 million in liabilities on a consolidated basis.

6. For the fiscal year ended November 30, 2005, the percentage of total net sales generated by each of the operating segments was as follows: Hillsdale Segment - 43%; Wolverine Segment - 16%; Defense and Space Power Segment - 20%; Commercial Power Solutions Segment - 1.5%; Specialty Materials Group Segment - 3%; Pharmaceutical Services Segment - 2%; Filtration and Minerals Segment - 14%.

B. Jurisdiction

7. The Court has jurisdiction over the Cases and authority to confirm the Plan pursuant to 28 U.S.C. § 1334.

8. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L) and the Court has jurisdiction to enter a final order with respect thereto.

9. The Debtors are eligible debtors under section 109 of the Bankruptcy Code.

10. Venue is proper before the Court pursuant to 28 U.S.C. § 1408 and 1409.

C. Disclosure Statement Hearing, Solicitation and Voting

11. On March 1, 2006 the Bankruptcy Court held a hearing to consider approval of the Disclosure Statement. The Bankruptcy Court entered the order approving the Disclosure

---

EPPHS, which is currently operated and managed by EPT. The Filtration and Minerals Segment is operated by EPFM.

Statement (the "Disclosure Statement Order") on March 2, 2006. (Doc. No. 1625.) The Disclosure Statement Order, *inter alia*, established procedures for solicitation and tabulation of votes to accept or reject the Plan (the "Solicitation Procedures").

12. Subsequent to the approval of the Disclosure Statement, the Debtors, in consultation with the Committee and other interested parties, have made certain non-material modifications to the Plan.[6] These immaterial modifications are in compliance with section 1127(a) of the Bankruptcy Code and meet the requirements of sections 1122 and 1123 of the Bankruptcy Code.

13. Pursuant to the Solicitation Procedures, on March 8, 2006, the Debtors caused to be mailed solicitation packages (the "Solicitation Packages") containing CD ROM copies of (a) the Disclosure Statement Order; (b) the notice of the Confirmation Hearing; (c) the Disclosure Statement (with a copy of the Plan attached as Exhibit A thereto); (d) an appropriate form of Ballot and a Ballot return envelope; and (e) letters from the Debtors and the Official Committee of Unsecured Creditors (the "Committee") recommending acceptance of the Plan.

14. The deadline for voting on the Plan was established as 12:00 noon (ET) on April 7, 2006. The Affidavit of Service of Brendan Halley, Notice Coordinator, The Trumbull Group, LLC, as the Court-appointed claims and balloting agent in the Cases (the "Balloting Agent"), (Doc. No. 1754), demonstrates that the Balloting Agent complied with the service requirements of the Solicitation Procedures.

---

[6] The amendments include, without limitation, (a) Plan modifications filed on February 24, 2006 (Doc. No. 1603), March 2, 2006 (Doc. No. 1628), April 17, 2006 (Doc. No. 1863), and May 31, 2006 (Doc. No. 2114); (b) Plan Supplements, filed on April 12, 2006 (Doc. No. 1836); May 2, 2006 (Doc. No. 1963); May 12, 2006 (Doc. No. 2002), and May 18, 2006 (Doc. No. 2029); and (c) Executory Contract Lists (as part of the Plan Supplements), filed on March 28, 2006 (Doc. Nos. 1758, 1759, 1760, 1761, 1764, and 1765), April 12, 2006 (Doc. No. 1835), April 13, 2006 (Doc. No. 1841), April 18, 2006 (Doc. Nos. 1874 and 1878), April 19, 2006 (Doc. No. 1881), April 26, 2006 (Doc. No. 1932), May 11, 2006 (Doc. No. 1989), May 19, 2006 (Doc. No. 2030), and May 31, 2006 (Doc. No. 2108).

II. BALLOT RESULTS

15. As evidenced by the Declaration of William R. Gruber, Jr. Certifying Tabulation of Ballots Regarding Vote on Debtors' First Amended Joint Plan of Reorganization ("Gruber Declaration"), filed on April 13, 2006 (Doc. No. 1842), all Classes of Claims entitled to vote accepted the Plan, as follows:

In Classes 2C through 2F, 100% in number and 100% in amount voted to accept the Plan;

In Class 3C, 99% in number and 99% in amount voted to accept the Plan;

In Class 3D, 100% in number and 100% in amount voted to accept the Plan;

In Class 3E, 98% in number and 99% in amount voted to accept the Plan; and

In Class 3F, 87% in number and 75% in amount voted to accept the Plan.

III. PLAN OBJECTIONS

A. Objections Not Related to the Custodial Trust

16. The deadline for filing and serving objections to the Plan (other than the provisions of the Plan relating to Funding of the Custodial Trust) (the "Preliminary Objections") was 12:00 noon (ET), April 7, 2006.[7] Arguments on any unresolved Preliminary Objections were heard by the Bankruptcy Court at the hearing on confirmation of the Plan, on April 19, 2006 (the "Initial Confirmation Hearing").

17. Preliminary Objections were filed by, respectively, the United States of America on behalf of the Internal Revenue Service (the "IRS Objection") (Doc. No. 1789); the Colorado Department of Public Health and Environment (the "Colorado Objection") (Doc. No. 1829); Gold Fields Mining, LLC, jointly with Blue Tee Corp. (the "Blue Tee Objection") (Doc. No.

[7] The Debtors agreed to extend the deadline for the United States Government to file an Objection as to any issues other than Custodial Trust issues to April 14, 2006, and for Custodial Trust Issues to April 21, 2006. Subsequently, this deadline was extended to May 24, 2006, by the Pre-Hearing Scheduling Order for Continued Confirmation Hearing, entered May 8, 2006. (Doc. No. 1983.)

1811); the United States of America on behalf of the Environmental Protection Agency, the United States Department of Interior Fish and Wildlife Service and the Forest Service of the United States Department of Agriculture (the "USEPA Objection") (Doc. No. 1854); and the Missouri Department of Natural Resources (the "Missouri Objection") (Doc. No. 1856).

18. The IRS Objection and the Colorado Objections were resolved consensually, pursuant to, respectively, the Joint Stipulation Resolving the United States of America's Objection to Confirmation of the Debtors' First Amended Joint Plan of Reorganization (Doc. No. 1851), and the Stipulation and Agreed Order between Debtors-in-Possession and the Hazardous Materials and Waste Management Division of the Colorado Department of Public Health and Environment Resolving Objection to Debtors' First Amended Joint Plan of Reorganization (Doc. No. 1908).

19. The Missouri Objection stated three bases for objecting to confirmation of the Plan: (a) the Plan impermissibly provided for a two step transaction with a sale of real property (including certain real property in the State of Missouri (the "Missouri Property")) by the Debtors to the Plan Trust and then a sale by the Plan Trust to the appropriate NewCo(s); (b) the Plan anticipated that the proposed sale of the Missouri Property to the Plan Trust would occur prior to completion of the transfer of the state-issued environmental permit for that property to the appropriate NewCo(s); and (c) the Plan provided for the potential transfer of the Missouri Property to the appropriate NewCo(s) free and clear of the environmental obligations imposed by the State of Missouri. The Debtors filed a response to the Missouri Objection on April 17, 2006 (the "Missouri Response") (Doc. No. 1862), whereby they stated that the Plan had previously been amended to address the issues raised in the Missouri Objection. No representative of the State of Missouri attended the Initial Confirmation Hearing. As a result of the filing of the

Missouri Response, the Missouri Objection has been overruled by the Bankruptcy Court as moot, pursuant to the Order re Objections to Confirmation (the "Initial Objection Order"), dated May 5, 2006 (Doc. No. 1976).

20. The Blue Tee Objection and the U.S. EPA Objection together asserted the following objections to confirmation of the Plan: (a) section 12.01(a) of the Plan provided a discharge to the Debtors under a liquidating Plan in contravention of section 1141(d) of the Bankruptcy Code; (b) section 12.01(a) of the Plan provided a discharge of future claims against the Debtors, in violation of section 1141(d) of the Bankruptcy Code; (c) the language in section 12.01(a) of the Plan was designed to discharge certain environmental regulatory obligations that were not dischargeable "claims" for purposes of section 1141(d) of the Bankruptcy Code; (d) the language in section 12.01(d) of the Plan unlawfully provided a release of future claims against, among others, the Debtors, their Estates, New HoldCo and the NewCos; (e) the language of section 12.01(d) unlawfully released and discharged claims against various non-Debtor third parties; (f) the Recovery Model set forth in the Plan was improper and did not comply with the "best interests of the creditors" test under 11 U.S.C. § 1129(a)(7); (g) the Plan was not feasible because it did not provide for sufficient funding of the Custodial Trusts; and (h) miscellaneous Untied States' Objections.

21. The Debtors filed written responses to each of the Blue Tee Objection and the U.S. EPA Objection on, respectively April 14, 2006 (the "Blue Tee Response") (Doc. No. 1843) and April 17, 2006 (the "U.S. EPA Response") (Doc. No. 1862). Argument on the Blue Tee Objection, the Blue Tee Response, the U.S. EPA Objection and the U.S. EPA Response (other than on issues relating to the Initial Custodial Trust Objections, as defined below) were heard at the Initial Confirmation Hearing.

22. Following the Initial Confirmation Hearing, the Debtors have made certain amendments to the Plan, including, without limitation, sections 12.01(a), 12.01(b) and 12.01(d) of the Plan, which have resolved or rendered moot the portions of the Blue Tee Objection and the U.S. EPA Objections relating to the scope of discharges and releases granted under those sections (the "Discharge Objections"). As a result, the relevant portions of the Discharge Objections have been resolved pursuant to the Stipulation and Agreed Order among Debtors-in-Possession, Gold Fields Mining LLC, Blue Tee Corporation, the United States of America on behalf of the Environmental Protection Agency, the United States Department of the Interior Fish and Wildlife Service and the Forest Service of the United States Department of Agriculture Resolving, in part, Certain Objections to Debtors' First Amended Joint Plan of Reorganization, as Modified (Doc. No. 2120), entered by the Bankruptcy Court on dated May 31, 2006.

23. In addition, pursuant to the Initial Objection Order, the Bankruptcy Court overruled the portion of the Blue Tee Objection and the U.S. EPA Objection asserting that the Recovery Model was improper and failed to comply with section 1129(a)(7) of the Bankruptcy Code. Pursuant to the Initial Objection Order, the Bankruptcy Court found that the Debtors met their burden of proof with regard to the fairness of the Recovery Model and that the Recovery Model satisfies the best interest test of section 1129(a)(7) of the Bankruptcy Code.

24. No arguments were heard at the Initial Confirmation Hearing in connection with the portions of the Blue Tee Objection and the U.S. EPA Objection relating to the adequacy of Funding for the Custodial Trusts (the "Initial Custodial Trust Objections"). Instead, the Bankruptcy Court held these objections in abeyance until the continued hearing on the confirmation of the Plan, which occurred on June 1, 2 and 5, 2006 (the "Continued Confirmation Hearing"). Additionally, the Objections of the United States set forth in Paragraph 22 of the U.S.

EPA Objection and Paragraph 20 of the USEPA Custodial Trust Objection (defined below) were held in abeyance.

B. Objections to the Funding of the Custodial Trusts

25. On May 12, 2006, the Debtors filed a revised supplement to the Plan, providing a method for the timing and amount of the Funding for the Custodial Trusts. The deadline for the United States Environmental Protection Agency (the "U.S. EPA") and the state environmental protection agencies (together with the U.S. EPA, the "Environmental Parties"), or other parties, to file and serve objections to the Debtors' proposed Funding or the terms of the Custodial Trust and any related documents (together with the Initial Custodial Trust Objections, the "Custodial Trust Objections") was 12:00 midnight (ET) on May 24, 2006. The deadline for the Debtors to file and serve any responses to the Custodial Trust Objections was 4:00 p.m. (ET) on May 30, 2006.

26. On May 15, 2006, the Debtors filed the Declaration of Gary F. Vajda, P.E. in Support of Confirmation of Debtors First Amended Joint Plan of Reorganization, as Modified (Doc. No. 2009) (the "Vajda Report"). Also on May 15, 2006, the U.S. EPA filed its Scope of Work and Cost Estimate for the Eagle-Picher [sic] Sites (Doc. No. 2012) (the "Agency SOW").

27. At 12:30 a.m. on May 25, 2006, the U.S. EPA filed its Supplemental Objection of the United States of America to Confirmation of Debtors' First Amended Joint Plan of Reorganization on Custodial Trust Issues ("USEPA Custodial Trust Objection"). (Doc. No. 2053.) Pursuant to the USEPA Custodial Trust Objection, the U.S. EPA disputed the Debtors' proposed Funding of the EPA Custodial Trust for six sites located in the States of Michigan and Ohio.[8] None of the other Environmental Parties, nor any other party, filed an objection to the

[8] At the time USEPA Custodial Trust Objection was filed, the Debtors had reached agreements with the U.S. EPA and the relevant states as to the adequate amount of Funding for all sites located in the

Funding of the Custodial Trust or any other matters pertaining to the Custodial Trust. On May 30, 2006, the Debtors filed the Debtors' Brief in Response to Supplemental Objection of the United States of America to Confirmation of Debtors' First Amended Joint Plan of Reorganization on Custodial Trust Issues. (Doc. No. 2106.)

28. At the Continued Confirmation Hearing, the Bankruptcy Court heard testimony of witnesses presented by each of the Debtors and the U.S. EPA in support of the proposed Funding amounts the Debtors and the U.S. EPA, respectively, deemed to be appropriate for the sites at Sidney, Ohio (the "Sidney Site") and Urbana, Ohio (the "Urbana Site" and, together with the Sidney Site, the "Ohio Sites"). The Debtors presented the expert opinion of Gary Vajda, in support of its proposed Funding. The U.S. EPA elicited testimony from Paul Harper, an employee of the Debtors, Jon Gulch of the U.S. EPA, and Michael Starkey of the Ohio Environmental Protection Agency. In addition, the Court received into evidence, without objection, the declaration and report of Michael Kendzior. On June 13, 2006, the Court issued the Order Re: Objections to Confirmation on Custodial Trust Issues [Doc. No. 2158] (the "June 13 Order"), which overruled in part and granted in part the USEPA Custodial Trust Objection. The June 13 Order provides for funding of the custodial trust account for the Urbana Site in the amount of $45,000 and funding for the custodial trust account for the Sidney Site in the amount of $1,080,000.

IV. SPECIFIC CONFIRMATION REQUIREMENTS

States of Illinois, Kansas and Oklahoma. The six remaining sites (for which no agreements had been reached as to Funding) were located in Michigan (four sites) and Ohio (two sites). Late on the evening prior to the commencement of the Continued Confirmation Hearing, the Debtors reached an agreement with the U.S. EPA and the State of Michigan regarding the Funding to be provided in connection with the four Michigan sites. Evidence was heard at the Continued Confirmation Hearing regarding the proposed Funding for the two Ohio sites (located in Urbana, Ohio and Sidney, Ohio).

29. Pursuant to section 1129(a) of the Bankruptcy Code, the Court shall confirm a chapter 11 plan if the requirements of the thirteen subsections of section 1129(a) are met. To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan complies with the provisions of section 1129(a) by a preponderance of the evidence. *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.)*, 994 F.2d 1160, 1165 (5th Cir.), *cert. denied*, 510 U.S. 992 (1993); *In re Dow Corning Corp.*, 270 B.R. 393, 402 (Bank. E.D. Mich. 2001); *In re Future Energy Corp.*, 83 B.R. 470, 481 (S.D. Ohio 1988); *In re Mallard Pond Ltd.*, 217 B.R. 782, 785 (Bankr. M.D. Tenn. 1997).

30. Nevertheless, if a plan fails to meet the requirements under section 1129(a)(8) (requiring all impaired classes to accept the plan), the plan still shall be confirmed if it complies with section 1129(b) of the Bankruptcy Code. 11 U.S.C. § 1129(b).

31. Under section 1129(b) of the Bankruptcy Code a plan shall be confirmed without the affirmative acceptance of an impaired class or classes if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b) (1)-(2).

32. The following discussion demonstrates that the Plan meets these requirements.

A. Section 1129(a)(1) – Compliance with Code Provisions

33. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the "applicable provisions" of Title 11. 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) reveals that this provision embodies the requirements of, among others, sections 1122 and 1123 of the Bankruptcy Code, governing the classification of claims and the contents of the plan respectively. H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978). *See Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 648-49 (2d Cir. 1988) (stating that "the legislative history of subsection 1129(a)(1)

suggests that Congress intended the phrase 'applicable provisions' in this subsection to mean provisions of Chapter 11 that concern the form and content of reorganization plans").

34. In determining whether a plan complies with section 1129(a)(1), it is appropriate to begin the analysis with section 1122 of the Bankruptcy Code, which governs classification of claims, and section 1123(a)(1) of the Bankruptcy Code, which sets forth certain required provisions that a plan must contain.

1. Section 1122 and 1123(a)(1) – Designation of Classes of Claims and Interests

a. Findings of Fact

35. The Plan and related documentation constitute all pertinent elements of the Debtors' proposed restructuring and the Plan.

36. Article 2 of the Plan sets forth the treatment of the following unclassified Claims[9]: (a) Allowed Administrative Expense Claims; (b) Fees of Professionals; (c) Indenture Trustee Fees; (d) Priority Tax Claims; (e) Other Priority Claims; and (f) Debtor in Possession Financing.

37. Article 3 of the Plan sets forth the classification of Claims and Equity Interests as follows:

(a) Unimpaired Classes of Claims (not entitled to vote on the Plan, deemed to have accepted the Plan under 11 U.S.C. § 1126(f)

(i) Class 1: Allowed Secured Lender Claims;

(b) Impaired Classes of Claims (entitled to vote on the Plan):

(i) Class 2C—Pre-Petition Note Claims against EPT;

(ii) Class 2D—Pre-Petition Note Claims against EPPHS;

(iii) Class 2E—Pre-Petition Note Claims against EPFM;

[9] Pursuant to 11 U.S.C. § 1123(a)(1), Administrative Expense Claims, Professional Fee and Expense Claims, and Priority Tax Claims are not required to be classified.

(iv) Class 2F—Pre-Petition Note Claims against the Hillsdale Debtors;

(v) Class 3C—Other Unsecured Claims against EPT;

(vi) Class 3D—Other Unsecured Claims against EPPHS;

(vii) Class 3E—Other Unsecured Claims against EPFM; and

(viii) Class 3F—Other Unsecured Claims against the Hillsdale Debtors.

(c) Impaired Classes of Claims (not entitled to vote on the Plan, deemed to have rejected the Plan under 11 U.S.C. § 1126(g)):

(i) Class 2A: Pre-Petition Note Claims against Holdings;

(ii) Class 2B: Pre-Petition Note Claims against EPI;

(iii) Class 3A: Other Unsecured Claims against Holdings; and

(iv) Class 3B: Other Unsecured Claims against EPI.

(d) Impaired Class of Interests (not entitled to vote on the Plan, deemed to have rejected the Plan under 11 U.S.C. § 1126(g):

(i) Class 4: Equity Interests.

Class 1 (Secured Claims)

38. Class 1 under the Plan is comprised of Secured Claims. Class 1 is Unimpaired. Due to the nature of the Class 1 Claims and the unique collateral for the Class 1 Claims, there are valid and sufficient business reasons to classify Class 1 Claims separate from the other Classes of claims in the Plan.

Class 2 (Pre-Petition Note Claims)

39. Class 2 under the Plan is comprised of the Pre-Petition Note Claims, i.e. the claims of holders of the 9-3/4% Senior Notes Due 2013, issued by Debtor EPI and guaranteed by certain subsidiaries and affiliates of EPI and Holdings. Class 2 is Impaired under the Plan. Due to the nature of the Class 2 Claims, there are valid and sufficient business reasons to classify Class 2 Claims separate from the other Classes of claims in the Plan.

40. Classes 2A – 2F are properly treated as separate under the Plan. Because none of the non-Hillsdale Debtors is substantively consolidated under the Plan, each of Classes 2A- 2F will realize different recovery amounts based on the asset valuation and debt allocation for the Debtor against whom the claims in that Class have been filed.[10]

Class 3 (Other Unsecured Claims)

41. Class 3 under the Plan is comprised of the Unsecured Claims of creditors other than those in Class 2. Class 3 is Impaired. Due to the nature of the Class 3 Claims, there are valid and sufficient business reasons to classify Class 3 Claims separate from the other Classes of claims in the Plan.

42. Classes 3A – 3F are properly treated as separate under the Plan. Because none of the non-Hillsdale Debtors is substantively consolidated under the Plan, each of Classes 3A- 3F will realize different recovery amounts based on the asset valuation and debt allocation for the Debtor against whom the claims in that Class have been filed.

Class 4 (Equity Interests)

43. Class 4 under the Plan is comprised of holders of Equity Interests. Class 4 is Impaired. The Plan provides that holders of Allowed Class 4 Equity Interests will receive no distribution on account of such interests. Due to the different legal character of Equity Interests in Class 4, there are valid and sufficient business reasons to classify the Equity Interests in Class 4 separately from the other Classes in the Plan.

44. No party has objected to the classification of Claims and Equity Interest under the Plan.

---

[10] The Holders of Allowed Claims in Classes 2F (Prepetition Note Claims against the Hillsdale Debtors) and 3F (Other Unsecured Claims against the Hillsdale Debtors) will receive Distributions based on the consolidated asset value and debt allocation for the three Hillsdale Debtors.

45. The Plan's classification of Claims and Equity Interests is reasonable and necessary to implement the Plan. Separate classification of Secured Claims, Pre-Petition Note Claims, Other Unsecured Claims and Equity Interests, as well as separate classification of all Claims and Equity Interests on a Debtor-by-Debtor basis (except for the Hillsdale Debtors), is proper because these Claims and Equity Interests differ in legal and factual nature.

b. Conclusions of Law

46. Section 1123(a)(1) of the Bankruptcy Code requires that a plan classify all claims (with the exception of certain priority claims) and all interests, and that such classification comply with section 1122 of the Bankruptcy Code. 11 U.S.C. §§ 1123(a)(1) and 1122.

47. Section 1122(a) of the Bankruptcy Code provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). Plan proponents, such as the Debtors and the Committee, have significant flexibility in classifying claims under section 1122, as long as a reasonable legal and/or factual basis exists for the classification, and all claims within a particular class are substantially similar. *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 586 (6th Cir. 1986) (noting court's "broad discretion" to determine proper classifications).

48. Section 1122(a) "only addresses the problem of dissimilar claims being included in the same class." *U.S. Truck Co.*, 800 F.2d at 585. "Section 1122(a) does not demand that all similar claims be in the same class." *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 661 (6th Cir. 2002). *See In re Snyder's Drug Stores, Inc.*, 307 B.R. 889 (Bankr. N.D. Ohio 2004).

49. No party objected to confirmation of the Plan on the basis of failure to comply with sections 1122 and 1123(a)(1) of the Bankruptcy Code.

50. The Plan complies with sections 1122 and 1123(a)(1) of the Bankruptcy Code. The Plan's classification of Claims and Equity Interests is reasonable and necessary to implement the Plan. Separate classification of Secured Claims, Pre-Petition Note Claims, Other Unsecured Claims and Equity Interests is proper because these Claims and Equity Interests differ in legal and factual nature. No provision of the Plan provides for relief beyond what is permissible under the Bankruptcy Code.

2. Section 1123(a)(2) – Specification of Unimpaired Classes

a. Findings of Fact

51. Article 4 of the Plan summarizes all Classes of Claims and Equity Interests and states whether they are impaired or unimpaired under the Plan.

b. Conclusions of Law

52. Section 1123(a)(2) of the Bankruptcy Code requires that a plan specify any class of claims or interests that is not impaired under the plan.

53. No party objected to confirmation of the Plan on the basis of failure to comply with sections 1122 and 1123(a)(2) of the Bankruptcy Code.

54. The Plan meets the requirements of section 1123(a)(2) of the Bankruptcy Code.

3. Section 1123(a)(3) – Treatment of Claims within Classes

a. Findings of Fact

55. Article 4 of the Plan sets forth the treatment of impaired Classes of Claims and Equity Interests under the Plan.

b. Conclusions of Law

56. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan."

57. No party objected to confirmation of the Plan on the basis of failure to comply with sections 1122 and 1123(a)(3) of the Bankruptcy Code.

58. The Plan properly specifies the treatment of all impaired Classes of Claims and Equity Interests under the Plan, and satisfies section 1123(a)(3).

4. Section 1123(a)(4) –Non-discrimination Within Classes of Claims or Interests

a. Findings of Fact

59. Article 4 of the Plan provides for treatment of Classes of Claims and Equity Interests. Each holder of an Allowed Claim or Equity Interest within a given Class receives identical treatment of its Claim or Equity Interest under the Plan.

b. Conclusions of Law

60. Section 1123(a)(4) of the Bankruptcy Code requires that a Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4).

61. No party objected to confirmation of the Plan on the basis of failure to comply with sections 1122 and 1123(a)(4) of the Bankruptcy Code.

62. Because the Plan provides for the same treatment of each Allowed Claim or Equity Interest in each respective Class, unless the holder of a particular Allowed Claim or Equity Interest has agreed to less favorable treatment of such Allowed Claim or Equity Interest, section 1123(a)(4) of the Bankruptcy Code has been satisfied.

5. Section 1123(a)(5) – Adequate Means for Plan Implementation

a. Findings of Fact

63. Article 5 of the Plan provides adequate and reasonable means for implementation of the Plan.

64. Section 5.01 of the Plan provides for the formation of New HoldCo and the NewCos for the purpose of acquiring the Transferred Assets of the Debtors. The NewCos will operate their businesses as separate legal entities independent and distinct from the Debtors.[11]

65. Section 5.02 of the Plan provides for the transfer of the Transferred Assets to New HoldCo and the NewCos, in accordance with, and as contemplated by sections 363, 1123, 1129, and 1141 of the Bankruptcy Code.

66. Section 5.04 of the Plan provides that the New HoldCo Common Stock shall be authorized and delivered to the Debtors, together with other Plan Consideration, in exchange for the Transferred Assets, which securities shall be exempt from registration under the securities laws under Regulation D and, to the extent applicable, section 1145 of the Bankruptcy Code.

67. Section 5.09 of the Plan provides for the vesting of the Transferred Assets in the appropriate NewCo, free and clear of all Liens, Claims, encumbrances, and Other Interests.

68. Section 5.07 of the Plan provides for financing pursuant to the Exit Financing Facilities. Such facilities shall be used, *inter alia*, as Plan Consideration, to fund the Custodial Trust in the amounts determined by the Bankruptcy Court and to provide working capital for the NewCos and New HoldCo.

69. Sections 5.10 and 5.14 of the Plan provide for the assumption and assignment to New HoldCo and the NewCos of the employee pension and benefit plans and the management incentive plan.

---

[11] These findings of fact contain summaries of various sections of the Plan, including the releases and exculpation included in Article 12 of the Plan. These summaries are not intended to be exclusive or all-inclusive, and to the extent of any conflict between the terms and conditions of these findings of fact and those in the Plan, except to the extent expressly set forth in the Confirmation Order, the terms and conditions of the Plan shall control and govern.

70. Section 5.12 of the Plan provides that, on the Effective Date, certain environmentally impacted real property owned by the Debtors (defined in the Plan as either "Designated Property" or "Transitional Property") will be transferred into the EP Custodial Trust, which will take title to the Designated Property and the Transitional Property pursuant to the terms of the Custodial Trust Agreement.

71. As set forth in section 5.12:

(a) The Designated Property is not necessary to the operation of the Debtors' businesses.

(b) The Designated Property and the Transitional Property will not be included in the Transferred Assets to be sold to the NewCos.

(c) Neither New HoldCo nor any of the NewCos shall be, or be deemed to be, an owner, operator, trustee, partner, agent, shareholder, officer or director of the EP Custodial Trust, or an owner or operator of the Designated Property or an owner of the Transitional Property; provided, however, that nothing in the Plan shall relieve any entity of any liability from any new acts after the Effective Date creating liability under Environmental Laws and nothing in the Plan shall relieve any entity that operates or owns the Properties after the Effective Date from any liability under Environmental Laws as an operator or owner of the Properties after the Effective Date.

(d) Except as otherwise provided in the Plan, on the Effective Date, the Designated Property and the Transitional Property will be transferred to the EP Custodial Trust, which will take title to the Designated Property and the Transitional Property.

(e) Certain property currently titled in the name of EPI, located in Cherokee County, Kansas will be treated as property titled in the name of EPT (consistent with the pre-petition documentation governing the transfer of such property from EPI to EPT) and will be treated as EPT property for purposes of funding the EP Custodial Trust.

(f) The purpose of the EP Custodial Trust will be to (i) own the Designated Property and own and lease the Transitional Property, pursuant to the TP Leases; (ii) manage the Environmental Actions and fund the applicable Environmental Costs; (iii) where applicable, continue Environmental Actions currently underway at any of the Properties; (iv) implement the terms of any Pending Environmental Settlement Agreements with the Environmental Agencies; and (v) sell, transfer, or otherwise dispose of the

Designated Property and the Transitional Property to one or more third parties.

(g) The EP Custodial Trust will be administered by the Custodial Trustee pursuant to the terms and conditions of the Custodial Trust Agreement, which has been filed with the Court.

(h) The EP Custodial Trust will be funded in the total amount of $17,771,700 (the "Funding Amount"), which consists of the sum of (a) $13,646,000, representing the aggregate amount that the Debtors and the relevant Environmental Agencies have agreed will be funded to pay the Environmental Costs for the properties that are the subject of the Pending Environmental Settlement Agreements; (b) $1,125,000, representing the amount that the Bankruptcy Court has determined at the Final Confirmation Hearing is sufficient to pay the Environmental Costs for all the Designated Property located in the State of Ohio; and (c) $2,940,700, plus a holdback of up to fifteen percent of Residual Interests as provided in the Custodial Trust Agreement, representing the amount that the Debtors and U.S. EPA have agreed, for purposes of settlement, is sufficient to pay the administration costs of the EP Custodial Trust. The Funding Amount consists of the following:

(i) Environmental Costs associated with former EPT property located in Galena, IL - $1,150,000;

(ii) Environmental Costs associated with former EPT property located in Galena, KS - $6,560,000;

(iii) Environmental Costs associated with former EPT property located in Baxter Springs, KS - $349,000;

(iv) Environmental Costs associated with former EPT property located in Columbus/Treece, KS - $282,000;

(v) Environmental Costs associated with former EPT property located in Miami, OK - $600,000;

(vi) Environmental Costs associated with former EPT property located in Hockerville, OK - $105,000;

(vii) Environmental Costs associated with former EPI property located in River Rouge, MI - $700,000;

(viii) Environmental Costs associated with former Hillsdale Debtors property located in Hillsdale, MI (Industrial Drive) - $1,600,000;

(ix) Environmental Costs associated with former Hillsdale Debtors property located in Hillsdale, MI (South Street) - $800,000;

(x) Environmental Costs associated with former EPI property located in Inkster, MI - $1,500,000;

(xi) Environmental Costs associated with former EPI property located in Urbana, OH - $45,000;

(xii) Environmental Costs associated with former EPI property located in Sidney, OH - $1,080,000; and

(xiii) Other costs of administration for the EP Custodial Trust - $2,940,700, plus a holdback of up to fifteen percent of Residual Interests as provided in the Custodial Trust Agreement.

(i) Funding shall consist of Cash Funding of $4,266,699.88 in cash and $12,255,077 in Letters of Credit, and Lease Funding of $1,189,923.12, generated from the leasing of the Transitional Properties to one or more of the NewCos, pursuant to the TP Leases.

(j) The Funding of the EP Custodial Trust shall constitute an administrative expense of, respectively, EPI, EPT, and the Hillsdale Debtors.

(k) On or about the Effective Date, (i) the Debtors will deposit the Cash Funding in the respective Custodial Trust Accounts established by the Custodial Trustee pursuant to the terms of the Custodial Trust Agreement, and (ii) the Custodial Trustee and the applicable NewCos will execute the TP Leases.

(l) Except as otherwise provided for in the Custodial Trust Agreement or the Settlement Agreements, from and after the Effective Date, until the date on which the Plan Trust terminates, any Over Funding of, or Residual Interest in, the EP Custodial Trust will be granted to the Plan Trust for the benefit of the holders of Unsecured Claims against the Debtor who owned the Designated Property or Transitional Property from which the Over Funding or Residual Interest was generated, on a pro rata basis.

(m) From and after the date on which the Plan Trust terminates, any remaining Residual Interest in the EP Custodial Trust will be granted to the States in which the Designated Property and/or Transitional Property is located. If a state rejects its share of a Residual Interest, then the Residual Interest will revert to the county government in which such Designated Property or Transitional Property is located, and thereafter to a charity designated by the Custodial Trustee, in his sole discretion.

(n) The Custodial Trust Accounts are intended to be treated as either a "qualified settlement fund" as that term is defined in Treasury Regulation section 1.468B-1, or as a "disputed ownership fund" as that term is defined in Treasury Regulation section 1.468B-9.

(o) The EP Custodial Trust, the Custodial Trustee, New HoldCo and the NewCos, and their respective affiliates, subsidiaries, parents, members, shareholders, officers, directors, managers, employees, consultants, lenders, agents, attorneys, or other professionals and representatives shall be accorded under the Plan and Confirmation Order the broadest protection available under law with respect to any and all liability related to or in connection with the Designated Property, Transitional Property, and the EP Custodial Trust, including, but not limited to, CERCLA § 107(n), 42 U.S.C. § 9607(n); O.R.C. § 3746.27(A) (Ohio); 415 ILCS 5/22.2(h)(2)(D) (Illinois); MCL § 324.20101-20101b (Michigan); Mo. R.S. § 427.031 (Missouri); and KS § 65-352, et seq. (Kansas).

72. The Funding Amounts, which amounts the Court has determined, and, in the case of Designated Property and Transitional Property located in the States of Kansas, Oklahoma, Illinois and Michigan, with respect to which the Debtors and the United States Environmental Protection Agency ("USEPA") and the States of Kansas, Oklahoma, Illinois and Michigan, have agreed as set forth in the Settlement Agreements, are sufficient for settlement purposes to pay the Environmental Costs of such properties and to administer the EP Custodial Trust. By causing the Amounts to be made available to the Custodial Trustee, the Debtors will satisfy section 5.12(c) of the Plan.

73. The Debtors have reached proposed settlement agreements related to the Designated Property and Transitional Property located in the States of Kansas, Oklahoma, Illinois and Michigan with U.S. EPA and the Kansas Department of Health and Environment, Oklahoma Department of Environmental Quality, Illinois Environmental Protection Agency and Michigan Department of Environmental Quality (the "Pending Environmental Settlement Agreements"). These Findings of Fact and Conclusions of Law shall not be construed as constituting the Bankruptcy Court's approval of the Pending Environmental Settlement Agreements. Approval of the Pending Environmental Settlement Agreements shall be a condition subsequent to confirmation of the Plan and a condition precedent to the occurrence of the Effective Date of the Plan.

74. The Custodial Trust Agreement provides for William L. West to be appointed as the Custodial Trustee.

75. The Custodial Trust Agreement has been negotiated among the Debtors, the Committee, the United States Department of Justice on behalf of the U.S. EPA (the "United States"), the relevant State environmental agencies (other than Ohio) (the "States"), and William West, the proposed Custodial Trustee; the Committee, United States, States and the proposed Custodial Trustee have no objection to the form and terms of the Custodial Trust Agreement.

76. Section 5.13 of the Plan, together with the relevant Plan Supplement documents, provide the timing and process for dissolution of the Debtors after the Effective Date.

77. Section 5.15 of the Plan provides that Estate Causes of Action, other than those actions expressly included in the Transferred Assets, shall be assigned to a Plan Trust. Holders of Allowed Pre-Petition Note Claims and Allowed Other Unsecured Claims will be eligible to receive pro rata distributions of any proceeds obtained from pursuit of the Estate Causes of Action relating to the Debtor against which they hold an Allowed Claim.

78. Section 5.16 of the Plan provides that, except as otherwise provided in the Plan or Confirmation Order, all injunctions or stays pursuant to sections 105 or 362 of the Bankruptcy Code shall remain in full force and effect until the Effective Date of the Plan.

79. Except as otherwise provided in Article 10 of the Plan, the Plan provides for the assumption of all executory contracts and unexpired leases, including, without limitation, the Debtors' Collective Bargaining Agreements ("CBAs") with various labor unions and the Debtors' pension and benefit plans as described in section 5.14 of the Plan.

80. Article 12 of the Plan provides for, among other things, a release of certain claims by creditors against, among others, the Debtors, the Committee and its members, New HoldCo

and the NewCos, the Senior Replacement DIP Agent, Senior Replacement DIP Lenders, Junior Replacement DIP Agent and Junior Replacement DIP Lenders and each of their directors and officers, employees, attorneys, accountants, underwriters, investment bankers, financial advisors and agents (subject to certain exceptions, including claims arising from fraud, willful misconduct, or gross negligence). The Plan also provides for the discharge and release by the Debtors of certain claims against the officers, directors and employees of the Debtors, the Committee members, and each of their respective directors, officers, employees, attorneys, accountants, underwriters, investment bankers, financial advisors and agents.

81. Section 12.04 of the Plan provides, among other things, that nothing in the Plan (including, without limitation, Article 5), the Purchase Agreements or the Confirmation Order shall release, discharge, enjoin, or preclude any Person who filed a written objection to confirmation of the Plan within the time provided for in the Disclosure Statement Order or any Governmental Unit from asserting against any party any Claim arising after the Effective Date of the Plan.

b. Conclusions of Law

82. Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means" for its implementation and sets forth specific examples of such adequate means, including, but not limited to: (a) retention by the debtor of all or any part of the property of the estate; (b) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan; (c) merger or consolidation of the debtor with one or more persons; (d) cancellation or modification of any indenture or similar instruments; (e) amendment of the debtor's charter; (f) issuance of new securities; (g) sale by the debtor of all or any part of property of the estate; (h) or satisfaction or modification of any lien.

83. A chapter 11 debtor has broad discretion with respect to the means of implementing a plan of reorganization. *See In re XOFOX Ind., Ltd.*, 241 B.R. 541, 542 (Bankr. E.D. Mich. 1999) (while section 1125(a)(5) clearly mandates that the plan include means for implementation that are adequate, it does not purport to dictate what means are to be used). Means that are otherwise adequate may be included as long as they are appropriate and not inconsistent with the applicable provisions of the Bankruptcy Code. *State of Maryland, et al. v. Antonelli Creditors' Liquidating Trust, et al.*, 123 F.3d 777 (4th Cir. 1997). Section 1123(a)(5), however, requires some means by which the debtor may repay its debts. *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985).

84. Article 5 of the Plan provides a clear and reasonable procedure for its implementation, and satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

85. The provisions of section 5.12 of the Plan, relating to the EP Custodial Trust, including, without limitation, provisions relating to: (i) the transfer on the Effective Date of the Designated Property and the Transitional Property to the EP Custodial Trust; (ii) the vesting of title to the Designated Property and the Transition Property in the EP Custodial Trust; (iii) the transfer on the Effective Date of the Cherokee Property to the EP Custodial Trust and the treatment of that property as EPT property for purposes of the Funding and otherwise; (iv) the administration of the EP Custodial Trust by the Custodial Trustee; (v) the management of Environmental Actions and funding of the Environmental Costs relating to the Designated Property and the Transitional Property by the Custodial Trustee, on behalf of the EP Custodial Trust; (vi) the continuation, by the Custodial Trustee, of Environmental Actions at any of the Designated Properties or Transitional Properties; (vii) the Custodial Trustee's implementation of the terms of the Pending Environmental Settlement Agreements; (viii) the management, sale,

transfer and/or other distribution of the Designated Property and the Transitional Property by the Custodial Trustee; (ix) the leasing of the Transitional Property to one or more of the NewCos pursuant to the TP Leases; (x) the Funding of the Custodial Trust Accounts in accordance with the June 13 Order, the Plan and this Confirmation Order to pay Environmental Costs for the Designated Property and the Transitional Property and to administer the EP Custodial Trust; and (xi) additional protections from liability provided to the EP Custodial Trust, the Custodial Trustee, New HoldCo and the NewCos pursuant to section 5.12(j) of the Plan and the Confirmation Order, are fair and reasonable and provide adequate means of implementing the Plan under section 1123(a)(5) of the Bankruptcy Code, with respect to the Designated Property and the Transitional Property.

86. The Plan complies with section 1123(a)(5) of the Bankruptcy Code.

6. Section 1123(a)(6) – Required Charter Amendments

a. Findings of Fact

87. The Plan does not contemplate reorganized Debtors and, therefore, there are no charter amendments with respect to the Debtors' corporate governance. In accordance with section 5.01 of the Plan, the Plan provides for the formation of New HoldCo and the subsidiary NewCos, the charter documents for which are not governed by section 1123(a)(6) of the Bankruptcy Code.

88. Pursuant to section 11.01 of the Plan, certain of the charter documents of New HoldCo have been filed with the Plan Supplement, on April 12, 2006 (Doc. No. 1836).[12]

b. Conclusions of Law

---

[12] The Debtors subsequently filed a second Plan Supplement (Doc. No. 1963) on May 2, 2006, a revised second Plan Supplement (Doc. No. 2002) on May 12, 2006 and a supplemental revised second Plan Supplement (Doc. No. 2029) on May 18, 2006.

89. Section 1123(a)(6) of the Bankruptcy Code requires that a Plan provide for the inclusion in a corporate debtor's charter or the charter of any corporation referred to in section 1123(a)(5)(B) or (C) of the Bankruptcy Code provisions (i) prohibiting the issuance of nonvoting equity securities, and (ii) providing for an "appropriate distribution" of voting power among those possessing voting power.

90. No party objected to confirmation of the Plan on the basis of failure to comply with sections 1122 and 1123(a)(6) of the Bankruptcy Code.

91. Because the Plan does not contemplate reorganized Debtors and there are no charter amendments to the Debtors' corporate governance, the provisions of section 1123(a)(6) of the Bankruptcy Code are not applicable.

7. Section 1123(a)(7) – Manner of Selection of Officers and Directors and Trustees

a. Findings of Fact

92. The Plan does not contemplate reorganized Debtors.

93. The Plan contains information regarding the formation and corporate governance of New HoldCo and the NewCos that is of relevance to the creditors that will be receiving the stock of those entities.

94. Section 11.01 and 11.02 of the Plan, by and through the Disclosure Statement, indicates that the initial Board of Directors for each of NewCos and New HoldCo will be comprised of eight directors, initially consisting of:

> Todd Arden, a Partner in the distressed securities group of Angelo Gordon & Company, L.P.;
>
> Richard P. Bermingham, former chief executive officer and director of Collins Foods/Sizzler, and current CEO of Bermingham Investors;

James J. Gaffney, former Chairman of the Board and Chief Executive Officer of General Aquatics, Inc. (successor to KDI Corporation) and Vice Chairman of Viking Pacific Holdings Ltd.;

Mark K. Holdsworth, a founding member and Managing Partner of Tennenbaum Capital Partners, LLC, and former Vice President, Corporate Finance, of US Bancorp Libra;

Edward D. Horowitz, President and CEO of SES-Americom, and former Executive Vice President of Citigroup;

Donald L. Runkle, Senior Executive Advisor for Solectron Corporation, and past Vice-Chairman of Delphi Corporation;

David L. Treadwell, President and Chief Operating Officer of the Hillsdale Debtors, Chief Operating Officer at EPI and EPFM, and past CEO of Oxford Automotive. Mr. Treadwell will serve as CEO of New HoldCo and may serve as an officer of other NewCos;

General Ronald W. Yates, General, USAF, Retired, an independent consultant to the aerospace industry after 35 years in the United States Air Force as a combat fighter pilot and test pilot;

b. Conclusions of Law

95. Section 1123(a)(7) of the Bankruptcy Code requires that the Plan's provisions with respect to the manner of selection of any director, officer, or trustee, or any successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy . . . ." 11 U.S.C. § 1123(a)(7).

96. No party objected to confirmation of the Plan on the basis of failure to comply with sections 1122 and 1123(a)(7) of the Bankruptcy Code.

97. The provisions of the Plan regarding the manner of selection of officers and directors for New HoldCo and the NewCos are consistent with the interests of creditors and equity security holders and with public policy, thereby satisfying section 1123(a)(7) of the Bankruptcy Code.

8. Section 1123(b)(3) – Discharge of All Claims and Interests and Releases/Representatives of the Estate

a. Injunction, Release and Exculpation Provisions Are Fair and Equitable under 1123(b)(3)(A) and 1141(d)

(i) Findings of Fact

98. Section 12.01(a) of the Plan sets forth the breadth of the Debtors' discharge and exculpation pursuant to section 1141 of the Bankruptcy Code. That section provides that all treatment provided under the Plan shall be in exchange for, and in complete satisfaction, settlement, discharge and/or release of, all Claims and Equity Interests, including, without limitation, all demands, and liabilities that arose before the Effective Date and all debts of the kind specified in sections 502(g), 502(h) or 502 (i) of the Bankruptcy Code, to the fullest extent permitted by Bankruptcy Code section 1141. Such discharge and/or release of Claims and Equity Interests shall occur upon the Effective Date.

99. Section 12.01(b) of the Plan enjoins all holders of Claims and Equity Interests, from and after the Effective Date, from, among other things, commencing or continuing any action or enforcing or recovering any judgment or award on any Claim or Interest against the Debtors, their Estates New HoldCo, the NewCos, the Plan Trust, the Plan Trustee, the EP Custodial Trust, the Custodial Trustee, any of their respective assets or properties, or any of their respective subsidiaries or successors that has been discharged or released pursuant to section 12.01(a) of the Plan.

100. Section 12.01(c) of the Plan provides for the general release by the Debtors of claims against their officers, directors and employees; the Committee and its members; the Senior Replacement DIP Agent, the Junior Replacement DIP Agent, the Senior Replacement DIP Lenders, the Junior Replacement DIP Lenders (collectively the "Lenders") and each of their respective directors, officers, employees, attorneys, accountants, underwriters, investment bankers, financial advisors, and agents.

101. Subsection 12.01(d) of the Plan provides for a general exculpation of the Debtors, their Estates, the Committee, New HoldCo, the NewCos, the Plan Trust, the Plan Trustees, the EP Custodial Trust and the Custodial Trustee and each of their present and former directors, shareholders, officers, members, representatives and employees, lenders, agents, attorneys, advisors, accountants, investment bankers and financial advisors from Claims, debts, rights causes of action, liabilities or Equity Interests relating to any act or omission of, or relating to, the Debtors in connection with or arising out of, (a) the Cases; (b) the pursuit of confirmation of the Plan; (c) the consummation of the Plan; (d) the administration of the Plan; or (e) the distribution of property under the Plan. Subsection 12.01(d) expressly limits the scope of such exculpation, barring releases of claims arising out of gross negligence, bad faith or willful misconduct. In addition, the exculpation is not applicable to persons or entities serving in their capacity as officers, directors, employees, advisors or professionals of the Debtors in connection with (a) money borrowed or obligations incurred by such person or entity; (b) employment contracts; (c) consulting contracts; and (d) receipt of transfers from the Debtors in connection with the acquisition of subsidiaries, business enterprises or other material assets. Nothing in section 12.01(d) modifies or alters the liability of the Debtors or their estates for any Allowed or pending Administrative Claims.

102. Section 12.04 of the Plan provides that nothing in the Plan (including, without limitation, Article 5), Purchase Agreements or Confirmation Order shall (a) release, discharge, enjoin, or preclude (i) any Person who filed a written objection to confirmation of the Plan within the time period provided for in the Order Approving Disclosure Statement in Support of Debtors' Second Amended Joint Plan of Reorganization, [doc. no. 1625] or any Governmental Unit (as defined in the Bankruptcy Code) from asserting against any party any Claim arising

after the Effective Date of the Plan; *provided, however*, that any such Person entitled to assert any such Claim shall not be precluded from asserting such Claim or be prejudiced solely by virtue of the preclusion of any other Person from asserting a Claim by any provisions of the Plan or Confirmation Order; or (ii) any liability or cause of action under police or regulatory laws that any Governmental Unit may have that is not within the definition of "claim" under 11 U.S.C. § 101(5); or (b) expand, limit, affect or restrict in any manner whatsoever any party with respect to defenses against, or rights with respect to, any Claims of the type set forth in Section 12.04(a) of the Plan.

103. All objections to the injunction, release and exculpation provisions contained in Article 12 of the Plan have been resolved between the Debtors and the objecting party/parties or have been overruled by the Bankruptcy Court.

(ii) Conclusions of Law

104. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a plan may provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate.

105. Section 1141(d) of the Bankruptcy Court states, in pertinent part:

> "confirmation of a plan ... discharges a debtor from any debt that arose before the date of such confirmation..."

106. The settlements and adjustments of claims contained in the injunction, release, and exculpation provisions in Article 12 of the Plan are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtors and their chapter 11 estates, and such provisions shall be effective and binding upon all persons and entities.

107. The third-party exculpation described in section 12.01(d) of the Plan, by Holders of claims and Equity Interests of the Committee, the Committee members, New HoldCo, the NewCos, the Plan Trust, Plan Trustee, the EP Custodial Trust, the Custodial Trustee and certain

of their professionals, including, among others, officers, directors, advisers, and employees, acting in such capacities, is allowable and appropriate under applicable law including, without limitation, section 1141 of the Bankruptcy Code.

108. Accordingly, the non-debtor exculpation contained in Article 12 of the Plan are fair and equitable and fall within the ambit of such releases and exculpation allowed by courts under sections 1123(b)(3)(A) and 1141(d) of the Bankruptcy Code.

b. The Plan Trust and the EP Custodial Trust Qualify as "Representatives of the Estate"

(i) Findings of Fact

109. Section 5.15 of the Plan provides that, as of the Effective Date, the Debtors will assign to the Plan Trust the right to prosecute, settle, and release all Estate Causes of Action, except for actions expressly included in the Transferred Assets. The Plan Trustee will prosecute, settle, and release such Estate Causes of Action as a "representative of the estate" under section 1123(b)(3)(B) of the Bankruptcy Code.

110. Likewise, section 5.12 of the Plan provides, *inter alia*, that, with exception described in the Plan, on the Effective Date, (a) all the Designated Property and the Transitional Property will be transferred to the EP Custodial Trust; (b) all property currently titled in the name of EPI, located in Cherokee County, Kansas, will be treated as real property of EPT for purposes of funding the EP Custodial Trust; and (c) the EP Custodial Trust will be administered by the Custodial Trustee pursuant to the terms of the Custodial Trust Agreement.

111. The purposes of the EP Custodial Trust are to (a) own the Designated Property and own and lease the Transitional Property, pursuant to the TP Leases; (b) manage the Environmental Actions and fund the applicable Environmental Costs of the Designated Properties and the Transitional Properties; (c) where applicable, continue the Environmental

Actions currently underway at any of the Designated Properties or the Transitional Properties; (d) implement the terms of the Pending Environmental Settlement Agreements; and (e) sell, transfer, or otherwise dispose of the Designated Property and the Transitional Property to one or more third parties.

112. Sections 5.12 and 5.15 of the Plan and the respective trust agreements expressly establish the trusts and appoint the Plan Trust and the Custodial Trust, respectively, to own and hold the properties and assets transferred to the respective trusts, make authorized distributions and otherwise consummate the transactions, actions and claims contemplated by the Plan and Custodial Trust Agreement.

113. Such actions by the Plan Trust (acting through the Plan Trustee) and the EP Custodial Trust (acting through the Custodial Trustee) are designed to, and likely will, benefit the Debtors' unsecured creditors. The Plan generally contemplates that the proceeds from the Plan Trusts will be distributed to Classes of unsecured creditors in Classes 2 and 3 (including creditors in Classes 2A, 2B, 3A, and 3B).

(ii) Conclusions of Law

114. Section 1123(b)(3)(B) of the Bankruptcy Code provides that a plan may provide for the retention and enforcement, by the debtor or other appointed representative of the estate, of any claim or interest belonging to the debtor or to the estate.

115. Under section 1123(b)(3)(B) of the Bankruptcy Code, a party, other than the debtor or the chapter 11 trustee, which seeks to enforce a claim of the estate must show (1) that it has been appointed; and (2) that it is a representative of the estate. *McFarland v. Leyh* (*In re Texas Gen. Petroleum Corp.*) 52 F. 3d. 1330, 1335 (5th Cir. 1995) (citing *Citicorp Acceptance Co. v. Robinson* (*In re Sweetwater*) 884 F. 2d 1323, 1326-27 (10th Cir. 1989)). With respect to the second element, courts apply a case by case analysis. The primary concern is whether a

successful recovery by the appointed representative would benefit the debtor's unsecured creditors. *See generally, McFarland*, 52 F. 3d. 1330 (5th Cir. 1995) (liquidation trustee representative of the estate to pursue avoidance actions on behalf of debtor's unsecured creditors); *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279 (Bankr. S.D.N.Y. 1990) (trustee has standing as "representative of the estate" to pursue avoidable transfer claims against insiders of the debtor); *DuVoisin v. East Tennessee Equity Ltd. (In re Southern Ind. Banking Corp.)* 59 B.R. 638, 642 (Bankr. E.D. Tenn. 1986) (trustee of liquidation trust is a representative of the estate for purpose of pursuing fraudulent conveyance claims).

116. Courts in the Sixth Circuit have confirmed plans under which a trust was appointed as a representative of the estate under 11 U.S.C. § 1123(b)(3)(B) for purposes of pursuing claims on behalf of a chapter 11 debtor or its estate. *See, e.g., Belfance v. Pension Benefit Guaranty Corporation (In re CSC Ind., Inc. and Copperweld Steel Co.)*, 1997 Bankr. Lexis 2155 (Bankr. N.D. Ohio, 1997) (liquidation trustee, appointed as representative of the estate under 1123(b)(3)(B) pursuant to confirmed plan for purposes of, among other things, defending claims against the debtors); *DuVoisin v. East Tennessee Equity, Ltd. (In re Southern Ind. Banking Corp. d/b/a Daveco)*, 59 B.R. 638 (Bankr. E.D. Tenn., 1986) (trustee appointed under plan of reorganization had standing under 11 U.S.C. § 1123(b)(3)(B) to pursue claims and interests of the debtor).

117. The Plan Trust (acting through the Plan Trustee) and the EP Custodial Trust (acting through the Custodial Trustee) qualify as "representatives of the estate" under 11 U.S.C. § 1123(b)(3)(B) for all purposes under the Plan and the respective documents governing the respective trusts.

B. Section 1129(a)(2) – Eligibility of Proponent

1. Findings of Fact

118. Each of the Debtors is a corporation and is a proper debtor under section 109 of the Bankruptcy Code.

119. On the Petition Date, each of the Debtors filed a voluntary chapter 11 petition pursuant to section 301 of the Bankruptcy Code.

120. The Bankruptcy Court has jurisdiction over the Debtors' Bankruptcy Cases pursuant to 28 U.S.C. §§ 157 and 1334.

121. On April 22, 2005, the United States Trustee appointed the members of the Committee.

122. Venue in these cases is proper in this district pursuant to 28 U.S.C. § 1408.

123. The Debtors and the Committee are proper proponents of the Plan pursuant to section 1121(a) of the Bankruptcy Code.

124. As Plan proponents, the Debtors and the Committee have conducted themselves in accordance with chapter 11 of the Bankruptcy Code, including without limitation: (a) conducting the solicitation of votes on the Plan in a manner consistent with the Disclosure Statement Order; (b) obtaining approval of the Disclosure Statement; (c) complying with the Orders of the Bankruptcy Court; and (d) operating their businesses within the confines established by the Bankruptcy Code and the Orders of the Bankruptcy Court.

125. The Debtors, the Committee, the Lenders and their respective agents and professionals have acted in good faith within the meanings of sections 1125(e), 1126(e), and 1129(a)(3) of the Bankruptcy Code.

126. The Debtors have complied with all relevant provisions of the Bankruptcy Code, the Local Bankruptcy Rules and the specific rules of the Court throughout these Cases. No party

has objected to the Plan on this basis, and the Plan complies with the requirements of this section.

2. Conclusions of Law

127. Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "comply with the applicable provisions of [Title 11]." 11 U.S.C. § 1129(a)(2). The primary purpose of section 1129(a)(2) is to ensure that the plan proponents have complied with the disclosure requirements of section 1125 of the Bankruptcy Code in the solicitation of acceptances to the Plan. See *Tenn-Fla Partners v. First Union Nat'l Bank of Florida*, 229 B.R. 720, 733-34 (W.D. Tenn. 1999) (quoting *In re Trans World Airlines, Inc.*, 185 B.R. 302, 313 (Bankr. E.D. Mo. 1995).

128. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(2) of the Bankruptcy Code.

129. As set forth above, the Debtors have complied with the applicable provisions of the Bankruptcy Code, including the provisions addressing Plan disclosure and solicitation, thereby satisfying section 1129(a)(2) of the Bankruptcy Code.

C. Section 1129(a)(3) –Good Faith Requirements

1. Findings of Fact

130. The Plan is the product of extensive arms-length, open and honest negotiations among the Debtors and the Committee, and their respective legal and financial advisors. To a lesser extent, the Plan is also the product of negotiations with other constituencies, including certain state and federal environmental agencies.

131. The Plan was proposed and filed in order to reflect the results of these negotiations in accordance with the provisions of the Bankruptcy Code.

132. The Debtors' objectives in seeking chapter 11 relief and in proposing the Plan are twofold: (i) to preserve and protect the value of their businesses under chapter 11; and (ii) to maximize the value of property available for distribution to creditors.

133. Implementation of the Plan will maximize the value for the Debtors' creditors.

134. The Plan fairly achieves the overall reorganization of the debtors for the benefit of all creditors and Holders of Equity interests, a result consistent with the objectives and purposes of chapter 11.

2. Conclusions of Law

135. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." Although the term "good faith" is not explicitly defined in the Bankruptcy Code, good faith may exist "when there is a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Dow Corning Corp.*, 244 B.R. 673, 675 (Bankr. E.D. Mich. 1999), (*quoting In re Nikron, Inc.*, 27 B.R. 773, 778 (Bankr. E.D. Mich. 1983). See also *Hanson v. First Bank of S.D.*, 828 F.2d 1310, 1315 (8th Cir. 1987) ("In the context of a chapter 11 reorganization . . . a plan is considered proposed in good faith 'if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code.") (*quoting In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984)); *In re Koelbl*, 751 F.2d 137, 139 (2d Cir. 1984) (must show that plan was proposed with "honesty and good intentions and with a basis for expecting that a reorganization can be effected"); *In re Stolrow's Inc.*, 84 B.R. 167, 172 (9th Cir. BAP 1988) (finding that good faith requires fundamental fairness in dealing with one's creditors).

136. Whether a plan is proposed in good faith must be determined based upon the totality of the circumstances surrounding the formulation of the plan. *See In re Laguna Assoc.*

Ltd. P'ship, 30 F.3d 734, 738 (6th Cir. 1994). A finding of absence of good faith usually requires "misconduct in the bankruptcy proceedings, such as fraudulent misrepresentations or serious nondisclosures of material facts to the court." *In re River Village Assocs.*, 161 B.R. 127, 140 (Bankr. E.D. Pa. 1993), aff'd, 181 B.R. 795 (E.D. Pa. 1995). Whether a plan is proposed in good faith must be determined based upon the totality of the circumstances surrounding the formulation of the plan. *Id.* (citing *In re Laguna Assoc. Ltd. P'ship*, 30 F.3d 734, 738 (6th Cir. 1994)).

137. Based upon the totality of the circumstances, the Plan was proposed in good faith, not by any means prohibited by law and satisfies section 1129(a)(3) of the Bankruptcy Code.

D. Section 1129(a)(4) – Professional Fees

1. Findings of Fact

138. All payments made by the Debtors, as proponents of the Plan, for services or for costs and expenses in or in connection with the Cases, or in connection with the Plan and incident to the Cases, have been approved by this Bankruptcy Court as reasonable or are subject to this Bankruptcy Court's approval, as reasonable.

139. The professionals in the Cases are subject to established procedures with respect to the filing and presentation of applications for fees and the reimbursement of costs and expenses. To date, the Debtors have paid such fees, costs and expenses only pursuant to these court-approved procedures.

140. Section 2.02 of the Plan sets forth a procedure for the continued reimbursement of costs and expenses for professionals after confirmation.

2. Conclusions of Law

141. Section 1129(a)(4) of the Bankruptcy Code provides that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

142. Section 1129(a)(4) requires that payments of professional fees "for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case" may be paid only after such payments either have been approved by the Bankruptcy Court as reasonable or are subject to approval of the Bankruptcy Court as reasonable. *See In re Eagle-Picher Indus.*, 203 B.R. 256, 274 (Bankr. S.D. Ohio 1996).

143. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(4) of the Bankruptcy Code.

144. The Plan satisfies the requirements of section 1129(a)(4) of the Bankruptcy Code.

E. Section 1129(a)(5) – Disclosure of the Identities and Compensation Arrangements for the Directors and Officers

1. Findings of Fact

145. The Plan does not contemplate reorganized Debtors[13] or successors but provides information concerning the Plan Trustee and Custodial Trustee, as well as the directors of New HoldCo.

146. The service of the Plan Trustee and the Custodial Trustee in the capacities provided for in the Plan is consistent with the interests of creditors and with public policy. Neither the Plan Trustee not the Custodial Trustee is an insider of the Debtor.

147. The directors of New HoldCo have been disclosed in the Plan Supplement. In addition, the Disclosure Statement provides information concerning officers and directors of

[13] Additionally, one or more officers or employees of the Debtors may continue service to the Debtors until dissolution for certain limited purposes, such as facilitating the transfer of environmental operating permits.

New HoldCo and the NewCos, including whether any such officer or director was as an "insider" of the Debtors for purposes of section 101((31) of the Bankruptcy Code.

2. Conclusions of Law

148. Under section 1129(a)(5)(A)(i) of the Bankruptcy Code, the proponent of a plan must disclose the "identity and affiliations" of any individual who, after confirmation, will serve as a director or officer of the debtor, any affiliate of the debtor participating in a joint plan, or a successor to the debtor under the plan. 11 U.S.C. § 1129(a)(5)(A)(i). Moreover, section 1129(a)(5)(A)(ii) requires that the service of such individuals be "consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1129(a)(5)(A)(ii). *See In re Apex Oil Co.*, 118 B.R. 683, 704-05 (Bankr. E.D. Mo. 1990) (section 1129(a)(5)(A)(ii) met where debtors as well as creditors' committee believe control of reorganized entity by proposed individuals will be beneficial to reorganized debtor).

149. Section 1129(a)(5)(B) of the Bankruptcy Code requires a plan to disclose the identity of any "insider" who will be employed or retained by the reorganized debtor and the "nature of any compensation" for such insider. *See In re Texaco, Inc.*, 84 B.R. at 893, (Bankr. S.D.N.Y. 1988) (section 1129(a)(5)(B) satisfied when plan discloses debtors' existing officers and directors who will continue to serve in office after confirmation); *see also Apex Oil Co.*, 118 B.R. at 704-05 (section 1129(a)(5)(B) satisfied where plan fully disclosed that certain individuals will be employed by reorganized debtor and the terms of employment of such insiders).

150. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(5) of the Bankruptcy Code.

151. The disclosures provided by the Debtors satisfy the requirements of sections 1129(a)(5)(A) and (B) of the Bankruptcy Code. Based upon this evidence, the Debtors have satisfied the requirements of section 1129(a)(5).

F. Section 1129(a)(6) – Regulated Rates

152. The Debtors do not conduct operations in a regulated industry, and section 1129(a)(6) of the Bankruptcy Code is therefore inapplicable to the Plan.

G. Section 1129(a)(7) – The Best Interests Test

1. Findings of Fact

153. The Debtors' liquidation analysis, attached as Exhibit E to the Disclosure Statement (the "Liquidation Analysis"), provides an estimate of the cash proceeds that may be realized from the liquidation of each Debtors' assets in a hypothetical chapter 7 liquidation. The Debtors, in consultation with Houlihan Lokey Howard & Zukin Capital ("HLHZ"), their financial advisor, have also formulated the Recovery Model, which establishes the pro rata recovery from Plan Consideration for creditors of each Debtor under the Plan.

154. The assumptions, judgments, and estimates contained in the Liquidation Analysis and the Recovery Model, including the allocation of the Secured debt (the "Secured Debt Allocation"), are grounded in applicable law and a thorough analysis of, among other things, the Debtors' historic operations and the claims against the Debtors as of the Petition Date. The Secured Debt Allocation is consistent with actual use of the funds by the Debtors.

155. No factual foundation or legal argument has been presented by U.S. EPA or Blue Tee in their Preliminary Objections or otherwise supporting the denial of approval of the Recovery Model or the appropriateness of any alternative to the Recovery Model.

156. The Debtors' proposed payment of the Administrative Claims under the Plan is reasonable, fair and consistent with the Debtors' Recovery Model.

157. All Classes of Creditors entitled to vote on the Plan have voted in favor of the Plan.

158. With respect to the members of each impaired Class of Creditors under the Plan, the "best interest of creditors" test is satisfied. A review of the Liquidation Analysis and the Recovery Model demonstrates that recoveries to be received by impaired creditors under the Plan are no less than the recoveries those creditors would receive under a chapter 7 liquidation.

2. Conclusions of Law

159. Section 1129(a)(7) of the Bankruptcy Code attempts to provide protection to creditors and interest holders who are impaired under a plan and who have not voted to accept such plan by imposing a "best interests of creditors" requirement. Under that requirement, holders of impaired claims and interests who do not vote to accept the plan must:

> [R]eceive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 [of the Bankruptcy Code] on such date.

11 U.S.C. § 1129(a)(7) (A)(ii).

160. The best interests test focuses on individual dissenting creditors rather than classes of claims. The analysis requires that each holder of a claim or interest either accept the plan or receive or retain under the plan property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code. *In re Dow Corning Corp.*, 255 B.R. 445, 499 (E.D. Mich. 2000) ("Section 1129(a)(7)(A)(ii) ensures that the dissenting claimants receive in payment of their claims no less than what they would receive if the debtor were liquidated under chapter 7"). *See also, In re Future Energy Corporation*, 83 B.R. 470, 489 (Bankr. S.D. Ohio 1988).

161. Accordingly, if the Bankruptcy Court finds that each non-consenting member of an impaired class will receive at least as much under the Plan as it would receive in a chapter 7

liquidation, the Plan satisfies the best interests of creditors test. *See In re Montgomery Court Apts. Ltd.*, 141 B.R. 324, 331 (Bankr. S.D. Ohio 1992).

162. An exercise to determine what an impaired, non-consenting class member will receive in a hypothetical chapter 7 liquidation of a corporation is necessarily replete with assumptions and judgments. *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 290 (Bankr. S.D.N.Y. 1990). *See also In re MCorp Fin., Inc.*, 137 B.R. 219, 228 (Bankr. S.D. Tex. 1992) (the process of determining the hypothetical liquidation value is neither an exact science nor the product of mere calculations). In undertaking analyses in the context of the best interests of the creditors test, courts attach great importance to business and economic principles. *See, e.g. In re Exide Technologies, et al.*, 303 B.R. 48 (Bankr. D. Del. 2003).

163. As provided in the Initial Objection Order, the assumptions, judgments, and estimates contained in the Liquidation Analysis and the Recovery Model, including the Secured Debt Allocation, are reasonable and well supported by the facts, economic principles, and the opinion of the Debtors and their advisors. Creditors will not receive less under these models than they would in a chapter 7 liquidation. *See In re Kentucky Lumber Co.* 860 F.2d 674 (6th Cir. 1988).

164. The Court has expressly determined in the Initial Objection Order that the Recovery Model and the allocation of the Secured debt under the Plan meet the "best interests of the creditors" test set forth in section 1129(a)(7) of the Bankruptcy Code.

H. Section 1129(a)(8) – Acceptance by Impaired Classes

1. Findings of Fact

165. Each of the unimpaired Classes of Claims under the Plan, and each holder of a Claim in such Classes (Class 1), are conclusively deemed to have accepted the Plan and, in

accordance with section 1126(f) of the Bankruptcy Code, solicitations of acceptance with respect to each such Class is not required.

166. All Classes of Claims entitled to vote on the Plan (Classes 2C – 2F and Classes 3C-3F) have voted to accept the Plan.

167. Classes 2A, 2B, 3A, 3B and 4 receive no distribution under the Plan, are conclusively deemed to have rejected the Plan, and, in accordance with section 1126(g) of the Bankruptcy Code, solicitations of acceptance with respect to each such Class is not required.

2. Conclusions of Law

168. Section 1129(a)(8) of the Bankruptcy Code generally requires that a plan either provide for the non-impairment of claims and interests or be accepted by all impaired classes unless the provisions of section 1129(b) are satisfied. 11 U.S.C. § 1129(a)(8)(A).

169. Notwithstanding non-compliance with section 1129(a)(8) of the Bankruptcy Code, the Bankruptcy Court may confirm the Plan if it satisfies the requirements of section 1129(b) of the Bankruptcy Code with respect to non-accepting Classes and satisfies the other requirements of section 1129(a) of the Bankruptcy Code.

170. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(8) of the Bankruptcy Code.

171. The Debtors have not satisfied the requirements of section 1129(a)(8) of the Bankruptcy Code, and instead must satisfy section 1129(b).

I. Section 1129(a)(9) – Treatment of Priority Claims

1. Findings of Fact

172. Article 2 of the Plan provides for full payment in Cash of all Allowed Administrative Claims and Allowed Priority Claims, unless a holder of such Claim has agreed to an alternative treatment for such Claim.

173. Section 2.01 of the Plan provides that holders of any allowed Administrative Claim of the kind specified in section 503(b) of the Bankruptcy Code will receive Cash (or as otherwise agreed to by the administrative claimant) on the Distribution Date, on the date such Claim becomes allowed, or on the terms agreed to between the Debtor and the administrative claimant, pursuant to a contract or otherwise.

174. There are no Claims in the Cases under sections 507(a)(2) and 502(f) of the Bankruptcy Code.

175. Pursuant to section 2.04 of the Plan, in accordance with section 1129(a)(9)(C), Priority Tax Claims will be paid in cash over a six-year period after the Effective Date.

176. Pursuant to section 2.05 of the Plan, priority Claims of the type specified under sections 507(a)(3)and 507(a)(4) of the Bankruptcy Code and all other types of priority Claims set forth in section 507(a) of the Bankruptcy Code will be paid on the Distribution Date or such later date as such claims become due and payable.

177. The Debtors have demonstrated that they have sufficient Cash to fund the payment of the Claims entitled to priority pursuant to section 1129(a)(9) of the Bankruptcy Code.

2. Conclusions of Law

178. Section 1129(a)(9) of the Bankruptcy Code mandates certain treatment of claims entitled to priority under the Bankruptcy Code. *See In re Eagle-Picher Indus., Inc.*, 1996 U.S. Dist. LEXIS 17160 (S.D. Ohio 1996).

179. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(9) of the Bankruptcy Code.

180. The Plan meets the requirements under section 1129(a)(9) of the Bankruptcy Code for the treatment of claims arising under section 507(a) of the Bankruptcy Code.

J. Section 1129(a)(10) – Acceptance by at Least One Impaired Class

1. Findings of Fact

181. As set forth above, the Debtors' classification scheme for claims and Equity Interests contained in the Plan is reasonable and complies with the requirements of the Bankruptcy Code.

182. Each and every voting impaired Class (Classes 2C-2F and Classes 3C-3F) has voted to accept the Plan.

2. Conclusions of Law

183. If a plan has any impaired class of claims, section 1129(a)(10) of the Bankruptcy Code requires that at least one such impaired class of claims vote to accept the plan, determined without regard to the acceptance of the plan by any insider. *See In re Crosscreek Apts., 213 B.R. 521, 533 (Bankr. E.D. Tenn. 1997).*

184. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(10) of the Bankruptcy Code.

185. Because the Plan has been accepted by all the impaired Classes entitled to vote thereon, the Plan complies with section 1129(a)(10) of the Bankruptcy Code.

K. Section 1129(a)(11) – Feasibility

1. Findings of Fact

186. The Disclosure Statement contains projections for New HoldCo and the NewCos for fiscal years ending November 31, 2006 through 2009 (the "Projected Financials"). The Projected Financials demonstrate that, given reasonably estimated expenses and income, and taking into account cash reserves, the Debtors will be able to satisfy their obligations under the Plan.

187. The Projected Financials and the assumptions underlying them are realistic and reasonable and are supported by the evidence adduced prior to the Confirmation Hearing, including the analysis and opinions of the Debtors' financial advisors.

188. Section 5.07 of the Plan provides that on the Effective Date, the Debtors may exercise their option to convert the Senior Replacement DIP Facility, in the original principal amount of $220,000,000.00, into the Senior Exit Facility and to convert the Junior Replacement DIP Facility, in the original, principal amount of $50,000,000.00 into the Junior Exit Financing Facility. These Exit Financing Facilities, or any alternative exit facility, shall provide, among other things, working capital for New HoldCo and the NewCos in the form of, respectively, (a) a revolving credit facility and a synthetic letter of credit facility and (b) a term loan.

189. The terms of the Exit Financing Facilities are reasonable and appropriate and were negotiated at arms-length and in good faith by the Debtors and the Lenders under such facilities.

190. The capital and debt structure, and the business plans of New HoldCo and the NewCos provide the new companies with a sound financial and economic structure going forward that should support the value attributed to the common stock of New HoldCo that is being distributed under the Plan.

191. The Debtors proposed $900,000 and $45,000 as the Funding amounts to be provided to the EP Custodial Trust (the "Proposed Ohio Funding Amounts") in connection with the Sidney Site and Urbana Site, respectively.

192. U.S. EPA proposed alternate Funding amounts for each of the Ohio Sites in the Agency SOW (the "Agency Proposed Ohio Funding Amounts").

193. Neither the State of Ohio nor Ohio EPA filed any objection to the Debtors' Proposed Funding amount or any other confirmation issue.

194. EaglePicher Incorporated is the owner of both of the Ohio Sites.

195. Pursuant to the June 13 Order, the Court made findings of fact and conclusions of law with respect to the portion of the Funding required to be made by the Debtors with respect to the Ohio Sites. The June 13 Order and the findings of fact and conclusions of law contained therein is incorporated by reference herein in full.

196. Based upon the foregoing, the Plan is realistic, reasonable and capable of being implemented. Confirmation of the Plan is not likely to result in the need for further reorganization or liquidation.

2. Conclusions of Law

197. Section 1129(a)(11) of the Bankruptcy Code requires a finding that a plan is feasible as a condition precedent to confirmation. Specifically, the Bankruptcy Court must determine that:

> [C]onfirmation of the plan is not likely to be followed by liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. § 1129(a)(11).

198. Pursuant to the feasibility test set forth in section 1129(a)(11), the Bankruptcy Court must determine whether the plan offers a "reasonable prospect of success" and is workable. *In re Montgomery Court Apts. of Ingham Co., Ltd.*, 141 B.R. 324, 331 (Bankr. S.D. Ohio 1992); *In re Sugarhouse Realty, Inc.*, 192 B.R. 355, 366 (E.D. Pa. 1996). That Bankruptcy Code provision requires only a probability of success, not a guarantee of success. *In re U.S. Truck Co.*, 47 B.R. 932, 944 (E.D. Mich. 1985), *aff'd*, 800 F.2d 581 (6th Cir. 1986) ("[f]easibility does not, nor can it, require the certainty that a reorganized company will

succeed"); *Montgomery Court*, 141 B.R. at 331 ("Although more is required than mere hopes and desires, success need not be certain or guaranteed."); *In re Made in Detroit, Inc.*, 299 B.R. 170 , 176 (Bankr. E.D. Mich. 2003) ("The plan does not need to guarantee success, but it must present reasonable assurance of success") (*citing Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988)).

199. The key element of feasibility is whether the assumptions underlying the plan are realistic and reasonable, and are capable of being met. *See In re Ridgewood Apts. of Dekalb Co., Ltd.*, 183 B.R. 784, 789 (Bankr. S.D. Ohio 1995); *In re Eddington Thread Mfg. Co.*, 181 B.R. 826, 833 (Bankr. E.D. Pa. 1995) ("[A] plan satisfies [§ 1129(a)(11)] so long as there is a reasonable prospect for success and a reasonable assurance that the proponents can comply with the terms of the plan"); *see also In re Clarkson*, 767 F.2d 417, 420 (8th Cir. 1985) (court stating that the feasibility test contemplates the probability of actual performance of the provisions of the plan; the test is whether the things which are to be done after confirmation can be done as a practical matter) (quotation omitted).

200. The purpose of the feasibility test is to protect against visionary or speculative plans:

> ...a court cannot confirm a visionary scheme that promises creditors more than the debtor can possibly attain after confirmation, notwithstanding the proponent's sincerity, honesty, and willingness to make a best efforts attempt to perform according to the terms of the plan.

Mallard Pond, 217 B.R. at 785 (citations omitted). *See also Ridgewood Apts.*, 183 B.R. at 789; *Made in Detroit*, 299 B.R. at 176; *Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (quoting 5 Collier on Bankruptcy section 1129.02[11], at 1129-34 (15th ed. 1998)).

201. The Blue Tee Objection contained a statement that Blue Tee believes the amounts for the Funding contained in the Disclosure Statement were so underestimated that the Custodial Trusts will not be able to conduct the necessary remediation which would result in the insolvency of the NewCos, and on that basis objected to the Plan on the grounds that the Plan was not feasible. Blue Tee did not file any additional pleadings with respect to the actual Funding proposed by the Debtors that exceed those proposed in the Disclosure Statement (Doc. No. 2029), nor did Blue Tee appear at the Final Confirmation Hearing or propose any evidence to support is objection to feasibility. The Debtors did not seek confirmation on the basis of the estimated Funding provided in the Disclosure Statement which formed the grounds for the Blue Tee Objection. The Blue Tee Objection is overruled.

202. The EP Custodial Trust is a good faith effort to protect public health and safety by means not forbidden by applicable law. In fact, U.S. EPA has supported the use of such a trust in other bankruptcy cases. *See In re Phillips Services Corporation,* Case No. 03-37718-H2-11 (S.D. Texas).

203. Pursuant to the June 13 Order, the Bankruptcy Court has determined that the Ohio Sites shall be funded as follows: (a) the Urbana Site - $45,000 and (b) the Sydney Site - $1,080,000. By causing the Funding of the Ohio Sites in such amounts, together with the amounts set forth in paragraph 71(h) hereof with respect to the Designated Property and Transitional Property located in the States of Kansas, Oklahoma, Illinois and Michigan, the Debtors will satisfy section 5.12(c) of the Plan.

204. The record before the Bankruptcy Court establishes that the Plan is feasible. Accordingly, the Plan satisfies the requirements of section 1129(a)(11) of the Bankruptcy Code.

L. Section 1129(a)(12) –Payment of Certain Fees

1. Findings of Fact

205. Section 1129(a)(12) of the Bankruptcy Code requires that certain fees listed in 28 U.S.C. § 1930, determined by the Bankruptcy Court at the hearing on confirmation of a plan, be paid or that provision be made for their payment. 11 U.S.C. § 1129(a)(12).

206. The Plan provides that such fees constitute Administrative Claims and to the extent (if any) not previously paid, will be paid in full in cash on the Effective Date. The Plan Trustee will continue to make all payments required under 28 U.S.C. § 1930 until the case is closed or as may be agreed.

2. Conclusions of Law

207. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(12) of the Bankruptcy Code.

208. The Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

M. Section 1129(a)(13) – Satisfaction of Retiree Benefits

1. Findings of Fact

209. During the Cases, the Debtors have complied with, and continue to comply with, the provisions of their employee benefit plans.

210. The Plan generally provides that these benefit plans will be assumed and assigned to New HoldCo and the NewCos, who will likewise continue the employee benefit plans, as modified and/or revised by agreement between the parties, for the retirees after confirmation.

2. Conclusions of Law

211. Section 1129(a)(13) of the Bankruptcy Code requires that the plan provide for the continuation of retiree benefits at established levels consistent with section 1114 of the Bankruptcy Code, for the duration of the period that the debtor has obligated itself to provide such benefits.

212. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(13) of the Bankruptcy Code.

213. Because the Plan provides for the continuation of retiree medical benefits at their existing levels, the Plan complies with the requirements of section 1129(a)(13) of the Bankruptcy Code.

N. Section 1129(b) – Confirmation Without Acceptance by One or More Impaired Classes ("Cram Down")

1. Findings of Fact

214. As set forth above, the Plan satisfies all applicable provisions of section 1129(a) of the Bankruptcy Code other than section 1129(a)(8) of the Bankruptcy Code.

215. The Plan can be confirmed without acceptance by Classes 2A, 2B, 3A, 3B and 4, provided that the Plan meets the so-called "cram-down requirements" of section 1129(b) of the Bankruptcy Code.

a. The Plan Does Not Discriminate and is Fair and Equitable with Respect to Classes 2A, 2B, 3A, 3B, and 4

216. The Plan does not discriminate against holders of Claims or Equity Interest in Classes deemed to have rejected the Plan under 11 U.S.C. § 1126(g).

217. The creditors in Classes 2A, 2B, 3A, 3B and 4 represent all of the deemed rejecting impaired creditors. No similar creditors are placed in other Classes. No similar creditors receive a recovery under the Plan.

218. Thus, under the Plan's Recovery Model, the treatment of Classes 2A, 2B, 3A, and 4 is fair and equitable. No party objected to confirmation of the Plan on this basis.

b. The Plan Recovery Model is Consistent with EPI's Primary Obligation to Repay the Secured Debt

219. The primary allocation of Secured debt to EPI under the Plan Recovery Model is fair and equitable because it is consistent with applicable law and the Debtors' business practices.

220. The Secured debt originated under the August 7, 2003 Credit Agreement among EPI, EPH and, *inter alia*, Harris Trust and Savings Bank as Administrative Agent (the "Pre-Petition Credit Agreement"). EPI was the sole borrower under the Pre-Petition Credit Agreement. All of the other Debtors, including Holdings, were joint and several guarantors (the "Guarantors") of EPI's obligations pursuant to an August 7, 2003 Guarantee and Collateral Agreement (the "Pre-Petition Guarantee").

221. Primary allocation of the Secured debt to EPI is consistent not only with the terms of the instrument creating the obligation to repay the Secured debt (i.e., the Pre-Petition Credit Agreement) but also the pre-petition business practices of the Debtors and their secured lenders. EPI is the only Debtor that ever made payments of principal, interest, fees, expenses or other amounts to the agent under the Pre-Petition Credit Agreement.

222. Such allocation is also consistent with the use of the funds. EPI used the funds available under the term loan of the Pre-Petition Credit Agreement to repay indebtedness incurred by EPI in a leveraged buyout in 1998. None of the term loan facility was used by EPI for any other purpose or by the other Debtors.

223. EPI used most of the funds available under the revolving credit facility of the Pre-Petition Credit Agreement to invest in joint ventures and to acquire an EPI subsidiary, both of which are majority owned by EPI and neither of which is a Debtor.

224. Any residual "benefit" that may have been received by a non-EPI Debtor from the use of the borrowed funds under the Pre-Petition Credit Agreement is reflected in the pro rata allocation of the Secured debt to them above the amount of EPI's assets (the "Deficiency").

225. The Plan Recovery Model allocates the Deficiency among the non-EPI Debtors pro rata, based on the value of their assets as of the assumed Effective Date of the Plan.

226. Such allocation is fair and equitable and no party has objected to the Recovery Model on this basis.

227. Allocating the Secured debt to any of the other Debtors before exhausting EPI's assets is contrary to New York law and the other Debtors' rights under the credit instrument to be enforced against them.

c. Based Upon the Recovery Model, the Plan is Fair and Equitable for Cram Down Purposes

228. The treatment of Classes 2A and 3A in the Plan Recovery Model is not discriminatory and is fair an equitable under section 1129(b) of the Bankruptcy Code.

229. Holdings' sole asset is 100% of the common stock of EPI. EPI is insolvent. Thus, the value of Holdings' assets is $0. Therefore, the Plan properly makes no distribution to holders of Claims in Classes 2A and 3A.[14]

230. The only junior Class under the Plan is Class 4 and holders of Equity Interests in Class 4 likewise will not receive any distributions under the Plan.

231. With respect to Classes 2B and 3B (holders, respectively, of Pre-Petition Note Claims and Other Unsecured Claims against EPI), consistent with the Recovery Model,

[14] The Plan does provide that holders of Claims in Class 2A and 2B are entitled to receive pro rata distributions of any Estate Cause of Action Recoveries. Because all holders of Claims in these classes will receive the identical treatment with respect to any such recoveries, the Plan does not discriminate at all (let alone unfairly) and is fair and equitable.

following payment of all senior claims, there is no remaining asset value at EPI to make any distributions to holders of Claims in Classes 2B and 3B. Therefore, the Plan properly makes no distribution to holders of Claims in Classes 2B and 3B.[15]

232. The only junior Class under the Plan is Class 4 and holders of Equity Interests in Class 4 likewise will not receive any distributions under the Plan. The treatment of Classes 2B and 3B is not discriminatory and is fair an equitable under section 1129(b) of the Bankruptcy Code.

233. Because each of the Debtors is insolvent, the Equity Interests (in Class 4), which consist of the common stock of each Debtor, are worthless. The Plan therefore makes no distribution to holders of Equity Interests in Class 4.

234. There is no junior Class to Class 4.

235. The treatment of Class 4 is not discriminatory and is fair an equitable under section 1129(b) of the Bankruptcy Code.

236. The Recovery Model is fully supported by the Committee, which represents the interests of all unsecured creditors of the Debtors and which includes creditors of EPI.

237. Distribution under the Plan is straightforward and distributes the value of each Debtor to its creditors in strict conformity with the absolute priority rule. Unsecured creditors of each Debtor receive identical pro rata treatment of their Claims based on the value of the applicable Debtor's assets.

[15] The Plan does provide that holders of Claims in Class 3A and 3B are entitled to receive pro rata distributions of any Estate Cause of Action Recoveries and any Residual Interests. Because all holders of Claims in these classes will receive the identical treatment with respect to any such recoveries, the Plan does not discriminate at all (let alone unfairly) and is fair and equitable.

238. Based on the above factors, the Plan's Recovery Model forms a proper and compelling basis for determining that the Plan satisfies the cram down requirements of section 1129(b) of the Bankruptcy Code.

2. Conclusions of Law

239. Section 1129(b) provides that, if a plan of reorganization satisfies all of the requirements of section 1129(a) other than section 1129(a)(8) (requiring all impaired classes to accept the plan), a plan may be confirmed without such class's affirmative acceptance of the plan if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan" (the so-called "cram down" criteria) 11 U.S.C. §1129(b)(1).

240. The cram-down criteria require that an impaired class that rejects a plan must be treated fairly and equitably, and must "receive treatment which allocates value to the class in a manner consistent with the treatment afforded to the other classes with similar legal claims against the debtor." 5 Collier on Bankruptcy 1129.03[3] [b] at 1129-81 (Lawrence P. King ed., 15th ed. 1996). *See* 11 U.S.C. § 1129(b)(1); *In re Montgomery Court Apts., Ltd.*, 141 B.R. 324, 346 (Bankr. S.D. Ohio 1992).

241. Section 1129(b)(2) sets forth criteria for determining whether a plan is fair and equitable with respect to an impaired dissenting class. With respect to a dissenting class of unsecured creditors, the condition that a plan be fair and equitable requires either that (a) each claimant in that class receive a distribution equal to the allowed amount of its claim, ***or*** that (b) no junior class of claim or interest receive or retain on account of such junior claim or interest any property (the so-called "absolute priority rule"). 11 U.S.C. § 1129(b)(2)(B).

242. In analyzing the "fair and equitable" requirement under section 1129(b)(2), however, mere compliance with the absolute priority rule does not guarantee that the plan is fair

and equitable. To satisfy this standard, the plan must treat the dissenting classes fairly and not unduly shift the risk of reorganization to the dissenting classes. *See In re Montgomery Court*, 141 B.R. at 331; *In re Rivers End Apartments, Ltd.*, 167 B.R. 470, 486 (Bankr. S.D. Ohio 1994).

243. The Plan does not discriminate against the Holders of Claims and Equity Interests in the deemed rejecting Classes. The Plan affords all the creditors and Equity Holders in each of these Classes the same treatment – no recovery. No similarly-situated creditors have been placed in other Classes or receive a recovery under the Plan. Because they receive no recovery, the Plan does not unduly shift the risk of reorganization to the deemed rejecting Classes.

244. In addition, the primary allocation of Secured debt to EPI under the Plan Recovery Model is fair and equitable because it is consistent with applicable law and the Debtors' business practices.

245. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(b) of the Bankruptcy Code.

246. For these reasons, the Plan meets the "cram-down" requirements set forth under section 1129(b) of the Bankruptcy Code.

O. Substantive Consolidation of Hillsdale Entities

1. Findings of Fact

247. The Plan will be implemented in part through the substantive consolidation of Debtors EaglePicher Automotive, Inc., Daisy Parts, Inc., and Carpenter Enterprises Limited (collectively, the "Hillsdale Debtors"). (Plan § 5.08.)

248. The Hillsdale Debtors are centrally managed as a single automotive group comprised of different plants. The three legal entities have nearly identical officers, who operate and manage the Hillsdale Debtors as one integrated business without regard to separate corporate

formalities. While each of the Hillsdale Debtors has its own board of directors, the boards are all comprised of the same core group of individuals.

249. The Hillsdale Debtors maintain uniform letterhead, logos, building signage, invoices, business cards, and checks and have centralized, rather than individual, purchasing and accounting systems.

250. Revenues for each of the Hillsdale Debtors are treated as though they were a single entity, and their profits and losses are consolidated. They do not generate individual financial statements.

251. At the request of the Debtors at the outset of these chapter 11 cases (and without opposition by any party in interest), the Bankruptcy Court approved the submission of a consolidated list of Hillsdale Debtors' top 50 creditors, and consolidated schedules, and the Office of the United States Trustee approved the filing of consolidated Hillsdale Debtors' monthly operating reports, because the Hillsdale Debtors represented the sheer impossibility of untangling the assets and liabilities of each of the Hillsdale Debtors, and in creating separate financial statements.

252. Tracing certain of the Hillsdale Debtors' assets back to each of the individual legal entities would be cost prohibitive, if it were even possible. Moreover, the product of such an analysis would not be reliable and likely would not be accurate.

253. The substantive consolidation of the Hillsdale Entities will have the following effects:

(a) The chapter 11 cases of the Hillsdale Debtors shall be consolidated into the case of as a single consolidated case. All property of the estate of each Hillsdale Debtor shall be deemed to be property of the consolidated Hillsdale Debtors.

(b) All claims against each of the Hillsdale Debtor's estates shall be deemed to be claims against the consolidated Hillsdale Debtors' estate, all proofs of claim filed against one or more of the Hillsdale Debtors shall be deemed to be a single claim filed against the consolidated Hillsdale Debtors' estate, and all duplicate proofs of claim for the same claim filed against more than one of the Hillsdale Debtors Debtor shall be deemed expunged.

(c) No Distributions under the Plan shall be made on account of Intercompany claims by and among the Hillsdale Debtors and such Intercompany Claims shall not be treated or affected by the Plan.

(d) All equity interests owned by one Hillsdale Debtor in an affiliate shall remain outstanding after the Confirmation Date and shall not be affected by the Plan.

(e) Except as specifically provided herein, all guarantees by one Hillsdale Debtor in favor of any other Hillsdale Debtors shall be eliminated, and no Distributions under this Plan shall be made on account of claims based upon such guarantees.

(f) For purposes of determining the availability of the right of setoff under section 553 of the Bankruptcy Code, the Hillsdale Debtors shall be treated as one consolidated entity so that, subject to the other provisions of section 553, debts due to any of Hillsdale Debtors may be set off against the debts of any other of Hillsdale Debtors.

(g) Substantive consolidation shall not merge or otherwise affect the separate legal existence of (a) each Hillsdale Debtor for licensing, regulatory or other purposes, other than with respect to Distribution rights under this Plan and (b) of Debtors other than the Hillsdale Debtors.

(h) Substantive consolidation shall have no effect on valid, enforceable and unavoidable liens, except for liens that secure a Claim that is eliminated by virtue of substantive consolidation and liens against collateral that are extinguished by virtue of substantive consolidation. Substantive consolidation shall not impair or adversely affect in any respect any of the liens, claims, rights, priorities, protections and remedies granted under the Replacement DIP Order, the Senior Replacement DIP Facility, the Junior Replacement DIP Facility or the Senior or Junior Exit Financing Facilities.

(i) Substantive consolidation shall not have the effect of creating a Claim in a Class different from the Class in which a Claim would have been placed in the absence of substantive consolidation.

(j) Substantive consolidation shall not effect any applicable date(s) for purposes of pursuing any avoidance actions or other actions reserved to the Hillsdale Debtors pursuant to the Plan.

(k) Substantive consolidation shall not impact or otherwise affect provisions in the Plan, if any, which provide that specific entities comprising the Hillsdale Debtors shall be liable on specific obligations under the Plan.

254. Substantive consolidation of the Hillsdale Debtors' assets and liabilities would be administratively expedient, is a condition precedent to confirmation of the Plan, and would cause no harm to any party.

255. No party has objected to the Plan on this basis and substantive consolidation of the Hillsdale Debtors is appropriate and proper.

2. Conclusions of Law

256. Substantive consolidation of the Hillsdale Debtors' assets and liabilities is justified under all of the prevailing legal analyses and is in the best interests of the creditors as a whole.

257. The equitable doctrine of substantive consolidation permits a court in a bankruptcy case involving one or more related corporate entities, in appropriate circumstances, to disregard their separate corporate identities to consolidate and pool their assets and liabilities, and treat them as though held and incurred by one entity. *See Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966). *See also, White v. Creditors Serv. Corp.*, 195 B.R. 680, 684 (Bankr. S.D. Ohio 1996). "Substantive consolidation is employed in cases where the interrelationships of the debtors are hopelessly obscured and the time and expense necessary

to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all the creditors.'" *American Homepatient*, 298 B.R. at 152, 165 (MD TN 2003), (quoting *First Nat'l Bank of Barnesville v. Rafoth (In re Baker & Getty Fin. Servs.)*, 974 F.2d 712, 720 (6th Cir. 1992).

258. Substantive consolidation creates a single estate for the benefit of all creditors of all the consolidated corporations and combines such creditors into one creditor body. *See Stone v. Eacho (In re Tip Top Trailers, Inc.)*, 127 F.2d 284, 289 (4th Cir.), *cert. denied*, 317 U.S. 635 (1942). Courts have invoked their broad equity power to order substantive consolidation after reviewing the facts on a case-by-case basis in light of the guidelines gleaned from prior case law. *See American Homepatient*, 298 B.R. at 166; *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 59 (2d Cir. 1992) (authority for substantive consolidation is [found] in bankruptcy court's general equitable powers); *Fish v. East*, 114 F.2d 177, 191 (10th Cir. 1940); *In re Vecco Constr. Indus.*, 4 B.R. 407, 409 (Bankr. E.D. Va. 1980).

259. To determine whether substantive consolidation of debtor entities is appropriate, courts generally have looked to two, highly fact-specific analyses. *See In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518 (2nd Cir. 1988); *In re Auto-Train Corp., Inc.*, 810 F.2d 270 (D.C. Cir. 1987). In *Augie/Restivo*, the Second Circuit considered two critical factors to determine if substantive consolidation was appropriate: (1) whether creditors dealt with entities as a single economic unit and did not relay on their separate identity when extending credit; and (2) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors. *In re Augie/Restivo Baking Co.*, 860 F.2d at 518. Alternatively, the *Auto-Train* test requires that the proponent of substantive consolidation must first prove that (1) there is a substantial identity between the entities to be consolidated, and (2) substantive consolidation is necessary to avoid

some harm or realize some benefit. *Id.* If both elements are satisfied, the burden shifts to the objecting creditors to prove that (1) the creditors actually relied on the separate credit of one of the entities; and (2) the creditors will be prejudiced in some way as a result of the consolidation. If the creditors satisfy their burden, then the court may only approve substantive consolidation if the benefits of such action heavily outweigh the harms.

260. Ultimately, however, decisions regarding substantive consolidation are fact intensive and made on a case by case basis. *In re Eagle-Picher Industries, Inc.* 192 B.R. 903, 905 (S.D. Ohio 1996). In *In re Eagle-Picher*, this Bankruptcy Court, applying both the *Augie/Restivo* and the *Auto-Train* tests, concluded the debtors met their burden of proving that substantive consolidation of a parent debtor entity and a subsidiary debtor entity was appropriate under the facts. *In re Eagle-Picher Industries, Inc.* 192 B.R. 903 (S.D. Ohio 1996).[16]

261. The facts and circumstances present in the instant Cases support the substantive consolidation of the Hillsdale Debtors under both the *Auto-train* and the *Augie/Restivo* tests, as applied in *In re Eagle-Picher Industries, Inc.*.

P. Other Plan Provisions

1. Assumption or Rejection of Executory Contracts and Unexpired Leases

a. Findings of Fact

262. Article 10 of the Plan sets forth provisions relating to the Debtors' assumption or rejection of their executory contracts and unexpired leases. This article also contains procedures for the determination and payment of cure amounts for assumed contracts or leases, and sets a

[16] After analyzing the facts under both the *Augie/Restivo* test and the *Auto-train* test, the Court concluded that, for their immediate purposes, these two alternative tests "are not materially different..." *In re Eagle-Picher*, 192 B.R. at 905.

bar date for the filing of all proofs of claim relating to contracts or leases the Debtors have decided to reject.

263. Except as otherwise provided in Article 10 of the Plan, all unexpired leases and executory contracts of the Debtors not expressly rejected by the Debtors on or prior to the Confirmation Date (or which rejection is pending as of the Confirmation Date) will be deemed assumed.

264. Pursuant to section 10.02 of the Plan, the Debtors will also assume, and assign to New HoldCo and the NewCos, their indemnification obligations to their officers, directors and employees (the "Indemnification Obligations").

265. Pursuant to section 5.14 of the Plan, on and after the Effective Date, unless rejected pursuant to section 10.04 of the Plan,[17] the Debtors will assume, and assign to New HoldCo and the NewCos, all of their prepetition employment and severance policies and all compensation and benefit plans, policies and programs applicable generally to their respective employees or retirees, including, without limitation, all savings plans, retirement plans, health care plans, disability plans, incentive plans, and life, accidental death and dismemberment insurance plans (collectively the "Employee Plans"), in accordance with sections 365 and 1123 of the Bankruptcy Code.

266. The Employee Plans shall be assumed and assigned subject to any modifications negotiated by the parties or ordered by the Bankruptcy Court pursuant to section 1114 of the Bankruptcy Code.

267. The Debtors have executed sound business judgment in determining whether to (a) assume or reject each of their executory contracts and unexpired leases; (b) assume and

[17] The Debtors have no present intention of rejecting any collective bargaining agreement or employee benefit plan.

assign the Indemnification Obligations; and (c) assume and assign the Employee Plans. The executory contracts and unexpired leases to be assumed by the Debtors are valuable components of the continuing business and will contribute to a successful rehabilitation

268. In accordance with section 10.04 of the Plan, the Debtors have properly filed as exhibits to the Plan Supplement, and have served on affected parties in accordance with section 10.01 of the Plan, schedules of the executory contracts and unexpired leases to be rejected (the "Schedule of Rejected Contracts").

b. Conclusions of Law

269. Assumption and assignment of the executory contracts and unexpired leases, in accordance with Article 10 of the Plan, is authorized and approved under sections 365(a) and (e) of the Bankruptcy Code.

270. Courts have consistently deferred to the business judgment of the debtor-in-possession in determining whether assumption is in the debtor's best interest. *See, e.g., In re Orion Pictures Corp.*, 4 F.3d 1095, 1098-99 (2d Cir. 1993), *cert. dismissed*, 511 U.S. 1026 (1994); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311-12 (5th Cir. 1985) (a debtor can assume a lease under its "original, pre-bankruptcy terms . . . so long as such an assumption is a valid exercise of a debtors' business judgment"; A "[m]ore exacting scrutiny would slow the administration of the debtors' estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially"); *In re Buckhead America Corp.*, 180 B.R. 83, 88 (D. Del. 1995) (business judgment is standard for approving assumption or rejection).

271. The Bankruptcy Court's authorization and approval of assumption and assignments of executory contracts under Article 10 of the Plan extends to the Employee Plans. Courts have determined that, subject to section 1114 of the Bankruptcy Code, prepetition

employee benefit plans may be generally treated as "executory contracts" for purposes of assumption under section 365(a) of the Bankruptcy Code. *See, General Datacomm Inds., Inc. v. Arcara, et al. (In re General Datacomm Inds., Inc.)* 407 F.3d 616 (3rd Cir. 2005); *In re North American Royalties, Inc., et al.*, 276 B.R. 860, 865 (Bankr. E.D. Tenn. 2002). The decision to assume or reject these plans should be based on the economic benefit to the debtor and its creditors. *See In Re North American Royalties*, 276 B.R. at 865. A chapter 11 trustee may also sell or assign such an executory contract pursuant to section 365(f) of the Bankruptcy Code. *Id.* Section 1114 of the Bankruptcy Code, which prohibits a debtor-in-possession from unilaterally modifying or terminating a retiree benefit plan absent an agreement by the parties or court order, is inapplicable by its terms to the Debtors' intended assumption and assignment of the Benefit Plans. *See 11 U.S.C. § 1114; Id.; See also, In re North American Royalties,* 276 B.R. at 862.

272. The Debtors' assumption of the Employee Plans, and their assignment of those agreements to New HoldCo and the NewCos, are subject to the same "business judgment standard" as is described above in connection with the assumption or rejection of the Debtors' other executory contracts and unexpired leases. *See In re Orion Pictures Corp.*, 4 F.3d at 1099. The Debtors failure to assume and assign the Benefit Plans may result in unanticipated delays or expenses for its programs due to potential dissatisfaction and/or loss of employees. Thus, the Debtors' assumption of the Employee Plans, and the assignment thereof to New HoldCo and the NewCos, is in the best interests of the Debtors' estates and their creditors.

273. The assumption or rejection of any executory contracts or unexpired leases, including the Indemnity Agreements and the Employee Plans, and the assignment of such assumed contracts or leases to New HoldCo or a NewCo, pursuant to Article 10 of the Plan and the Schedule of Rejected Contracts, shall be legal, valid and binding upon the applicable Debtor,

NewCo and all non-Debtor parties to the executory contract or unexpired lease, all to the same extent as if the assumption or rejection had been effectuated pursuant to an order of the Bankruptcy Court entered before the Confirmation Date.

2. Assumption and/or Assignment of Collective Bargaining Agreements

a. Findings of Fact

274. Approximately 50 percent of EaglePicher's employees are union employees, most of who are employed pursuant to collective bargaining agreements (the "CBAs") between certain of the Debtors and each of, among others. the United Auto Worker, the United Steel Workers of America and the International Brotherhood of Teamsters ("Teamsters"). The remaining employees, which include salaried employees and non-union hourly employees, are not covered by CBAs.

275. The Plan provides that the prepetition CBA's (the "Prepetition CBAs") will be assumed and assigned by each Debtor to the applicable NewCo. A list of the Prepetition CBAs to be assumed is attached as Exhibit A to the Notice of Intent to Assume and Assign Collective Bargaining Agreements in Connection with Plan of Reorganization (doc. no 1759), filed by the Debtors on March 28, 2006.

276. Debtor EPFM is also a party to a CBA with the Teamsters one CBA with the Teamsters, dated May 31, 2005, relating to EPFM's operations in Lovelock, Nevada (the "Postpetition CBA"), which EPFM entered into, after the Petition Date, in the ordinary course of its business.

277. Pursuant to the Plan, the Postpetition CBA will be assigned to New EP Filtration & Minerals, LLC, even though the Postpetition CBA contains no provisions either restricting or allowing assignment of that agreement.

b. Conclusions of Law

278. The Bankruptcy Court for the Southern District of Ohio has held that 11 U.S.C. § 1113 provides the exclusive means for a debtor-in-possession to assume or reject a collective bargaining agreement. In *In re Ormet*, 316 B.R. 662, 664 (Bankr. S.D. Ohio 2004). Specifically, section 1113(a) of the Bankruptcy Code provides that a trustee or debtor-in-possession may assume or reject a collective bargaining agreement, only in accordance with the provisions of that section. However, the remaining subsections of section 1113 deal exclusively with rejection and modification of collective bargaining agreements, not assumption. *Amer. Flint Glass Workers Union v. Anchor Resolution Corp. (In re Anchor Resolution Corp.)*, 231 B.R. 559, 564 (D. Del 1999).[18] The purpose of section 1113 is to erect formidable barriers to the modification and termination (including rejection) of such an agreement. *See In re Sunarhauserman, Inc.*, 184 B.R. 279, 281 (Bankr. N.D. Ohio 1995).

279. Because the prepetition CBAs will not be rejected, but will be assumed and assigned in their prepetition form, or subject only to consensual modifications agreed upon by the parties, the Debtors' assumption of the prepetition CBAs complies with section 1113(a) of the Bankruptcy Code.

280. Section 1113 of the Bankruptcy Code is not applicable to collective bargaining agreements entered into by the debtor-in-possession or trustee during the postpetition period. *See In re The Leslie Fay Cos., Inc.*, 168 B.R. 294, 301 (Bankr. S.D.N.Y. 1994) (absent specific language to the contrary, section 1113 should apply only to pre-petition collective bargaining

[18] Section 1113(b) of the Bankruptcy Code sets out a specific process that a debtor-in-possession or trustee must follow before it may reject a CBA. 11 U.S.C. § 1113(b). Section 1113(c) lists requirements for court approval of such a proposed rejection. 11 U.S.C. § 1113(c). Section 1113(d) provides a time frame for the approval of the proposed rejection. 11 U.S.C. § 1113(d). Subsections 1113(e) and 1113(f) pertain only to termination or alteration of collective bargaining agreements. 11 U.S.C. §§ 1113(e)-(f); *see also In re Anchor Resolution Corp.* 231 B.R. at 564.

agreements). Further, the Postpetition CBA itself is silent with respect to terms of transfer to successors or assigns.

281. However, courts have interpreted the National Labor Relations Act, 29 U.SC. § 151, *et seq.*, the statute governing the administration and interpretation of collective bargaining agreements, to support the position that the Debtors should be able to formally assign the Postpetition CBA, without interference from the Teamsters, provided such agreement is binding in its entirety. *See e.g., Southward v. South Central Ready Mix Supply Corp.*, 7 F.3d 487 (6th Cir. 1993); *Peters v. NLRB*, 153 F.3d 289 (6th Cir. 1988).

282. Thus, the Debtors are permitted to assign the Postpetition CBA to EaglePicher Filtration & Minerals, LLC, as contemplated in the Plan.

3. Plan Documents

a. Findings of Fact

283. The Debtors, Plan Trust, EP Custodial Trust, New HoldCo and/or the NewCos, as the case may be, have exercised sound business judgment in determining to enter into various documents necessary to effectuate the Plan, including but not limited to, the Purchase Agreements, the Plan Trust Agreement, the Custodial Trust Agreement, the Exit Financing Agreements and other documents contained in the Plan Supplement or designated as Plan Exhibits and such other agreements, documents and instruments contemplated by the Plan, Plan Trust Agreement, Custodial Trust Agreement, Purchase Agreements and the Exit Financing Agreements and the transactions contemplated thereby (collectively, the "Plan Documents") on the terms and in the form set forth therein.

284. The Plan Documents are essential elements of the Plan and entry into the Plan Documents, as determined by the Bankruptcy Court in the Confirmation Order, is in the best interests of the Debtors, their Estates and creditors.

285. The Debtors have provided sufficient and adequate notice of the Plan Documents to all parties in interest in the Cases.

286. The Plan Documents have been negotiated at arm's length and in good faith and without intent to hinder, delay or defraud the Debtors, New HoldCo or the NewCos or any of their respective creditors.

b. Conclusions of Law

287. The Plan Documents are valid, binding and enforceable and not in conflict with any federal or state law.

288. The Plan Documents, all exhibits, documents and agreements included in the Plan Supplement and the execution, delivery and performance of the Plan Documents, exhibits, documents and agreements in substantially the form included in the Plan Supplement in accordance with their respective terms are hereby approved in all respects.

289. The consummation of the Plan and the execution, delivery and performance of the Plan Documents shall not result in or constitute a fraudulent transfer under any applicable federal or state law.

4. Other Transfers Under the Plan

a. Findings of Fact

290. Pursuant to section 6.02 of the Plan, the Debtors, in order to provide for the Distributions in Sections 4.02 of the Plan and otherwise in accordance with the Plan Trust Agreement, shall transfer and assign to the Plan Trust for the benefit of the Plan Trust Beneficiaries, the Initial Plan Trust Assets on or before the Effective Date and, from time to time thereafter, Future Plan Trust Assets (together with the Initial Plan Trust Assets, the "Plan Trust Assets") including Plan Consideration to be distributed in accordance with the terms of the Plan on the Effective Date.

PREPARED BY:

Stephen D. Lerner (OH 0051284)
Scott A. Kane (OH 0068839)
P. Casey Coston (MI 49871)
Kenneth R. Craycraft, Jr. (OH 0074253)
SQUIRE, SANDERS & DEMPSEY L.L.P
312 Walnut Street, Suite 3500
Cincinnati, Ohio 45202
Telephone: 513.361.1200
Facsimile: 513.361.1201
E-mail: slerner@ssd.com
skane@ssd.com
ccoston@ssd.com
kcraycraft@ssd.com
ATTORNEYS FOR
DEBTORS AND DEBTORS-IN-POSSESSION

CINCINNATI/56547

###

This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: June 28, 2006

J. Vincent Aug, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re:	)	**Chapter 11**
	)	
EAGLEPICHER HOLDINGS, INC., *et al.*,	)	**Jointly Administered**
	)	**Case No. 05-12601**
Debtors.	)	
	)	**Judge J. Vincent Aug, Jr.**

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION

PREPARED BY:

Stephen D. Lerner (OH 0051284)
Scott A. Kane (OH 0068839)
P. Casey Coston (MI 49871)
Kenneth R. Craycraft, Jr. (OH 0074253)
SQUIRE, SANDERS & DEMPSEY L.L.P
312 Walnut Street, Suite 3500
Cincinnati, Ohio 45202
Telephone: 513.361.1200
Facsimile: 513.361.1201
E-mail: slerner@ssd.com, skane@ssd.com, ccoston@ssd.com, kcraycraft@ssd.com

ATTORNEYS FOR
DEBTORS AND DEBTORS-IN-POSSESSION

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re:	)	**Chapter 11**
	)	
EAGLEPICHER HOLDINGS, INC., *et al.*,	)	**Jointly Administered**
	)	**Case No. 05-12601**
Debtors.	)	
	)	**Judge J. Vincent Aug, Jr.**

DEBTORS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION

EaglePicher Holdings, Inc. ("Holdings") and certain of its affiliates, each a debtor[1] and debtor-in-possession in the above captioned cases (collectively, the "Debtors"), hereby submit these proposed findings of fact and conclusions of law (the "Findings of Fact and Conclusions of Law") with respect to the Debtors' Second Amended Joint Plan of Reorganization, dated May 31, 2006 (Doc. No. 2114) (as amended from time to time, the "Plan").[2] The Debtors filed the Plan to facilitate the transfer of substantially all their assets (the "Transferred Assets") and certain specified liabilities to a newly formed holding company ("New HoldCo") and various newly formed subsidiary operating companies (each a "NewCo," and collectively the "NewCos")), and the satisfaction of claims against the Debtors through the distribution of the consideration received on account of the Transferred Assets, among other things.

---

[1] The debtors are: EaglePicher Incorporated; EaglePicher Technologies, LLC; EaglePicher Pharmaceutical Services, LLC; EaglePicher Filtration & Minerals, Inc.; EaglePicher Automotive, Inc.; Daisy Parts, Inc.; and Carpenter Enterprises, Limited.

[2] All capitalized terms not defined herein shall have the meanings ascribed to them in the Plan or the Disclosure Statement in Support of Debtors' First Amended Joint Plan of Reorganization, dated March 2, 2006 (the "Disclosure Statement").

I. BACKGROUND FACTS REGARDING THE DEBTORS

A. Current Business Operations

1. Formerly headquartered in Phoenix, Arizona, Holdings is a majority-controlled subsidiary of Granaria Holdings, B.V. of the Netherlands, with domestic operations throughout the United States. The remaining Debtors are affiliates of Holdings. Debtor EaglePicher Incorporated is an Ohio corporation. The Debtors have recently moved their corporate headquarters to Detroit, Michigan. Upon consummation of the transactions contemplated by the Plan, New HoldCo will have its corporate headquarters in Detroit.

2. The Debtors are diversified manufacturers of advanced technology and industrial products that are used in automotive, defense, aerospace, telecommunications, medical implant devices, pharmaceutical services, nuclear energy, food and beverage, filtration and minerals and other industries. The Debtors have a long history of innovation in technology and engineering which has helped them to become a market leader in certain markets in which they compete.

3. The Debtors' operations consist of three businesses: Automotive, Filtration and Minerals, and Technologies. The businesses are further organized into seven operating segments (the "Segments"): (a) the Hillsdale Segment[3]; (b) the Wolverine Segment[4]; (c) the Defense and Space Power Segment; (d) the Commercial Power Solutions Segment; (e) the Specialty Materials Group Segment; (f) the Pharmaceutical Services Segment; and (g) the Filtration and Minerals Segment.[5]

---

[3] The business segment that includes the Hillsdale Debtors.

[4] The Wolverine business division is located within Debtor EPI.

[5] The operating segments do not correspond directly to individual Debtor entities. For example, the Hillsdale Segment is operated through the consolidated Hillsdale Debtors. The Wolverine Segment and the Commercial Power Solutions Segment are part of EPI (although the Commercial Power Solutions Segment is currently operated by EPT). The Defense and Space Power Segment and the Specialty Materials Group Segments are operated by EPT. The Pharmaceutical Services Segment is located within

4. Together, the Debtors employ about 2,600 people, approximately 44% of whom are union employees. Of the union employees, most are represented by the United Auto Workers, the United Steelworkers of America, or the International Brotherhood of Teamsters.

5. For the fiscal year ended November 30, 2005, the Debtors generated a combined net loss of approximately $41 million on approximately $670 million in net sales. As of November 30, 2004, the Debtors had approximately $570 million in assets and approximately $825 million in liabilities on a consolidated basis.

6. For the fiscal year ended November 30, 2005, the percentage of total net sales generated by each of the operating segments was as follows: Hillsdale Segment - 43%; Wolverine Segment - 16%; Defense and Space Power Segment - 20%; Commercial Power Solutions Segment - 1.5%; Specialty Materials Group Segment - 3%; Pharmaceutical Services Segment - 2%; Filtration and Minerals Segment - 14%.

B. Jurisdiction

7. The Court has jurisdiction over the Cases and authority to confirm the Plan pursuant to 28 U.S.C. § 1334.

8. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L) and the Court has jurisdiction to enter a final order with respect thereto.

9. The Debtors are eligible debtors under section 109 of the Bankruptcy Code.

10. Venue is proper before the Court pursuant to 28 U.S.C. § 1408 and 1409.

C. Disclosure Statement Hearing, Solicitation and Voting

11. On March 1, 2006 the Bankruptcy Court held a hearing to consider approval of the Disclosure Statement. The Bankruptcy Court entered the order approving the Disclosure

---

EPPHS, which is currently operated and managed by EPT. The Filtration and Minerals Segment is operated by EPFM.

Statement (the "Disclosure Statement Order") on March 2, 2006. (Doc. No. 1625.) The Disclosure Statement Order, *inter alia*, established procedures for solicitation and tabulation of votes to accept or reject the Plan (the "Solicitation Procedures").

12. Subsequent to the approval of the Disclosure Statement, the Debtors, in consultation with the Committee and other interested parties, have made certain non-material modifications to the Plan.[6] These immaterial modifications are in compliance with section 1127(a) of the Bankruptcy Code and meet the requirements of sections 1122 and 1123 of the Bankruptcy Code.

13. Pursuant to the Solicitation Procedures, on March 8, 2006, the Debtors caused to be mailed solicitation packages (the "Solicitation Packages") containing CD ROM copies of (a) the Disclosure Statement Order; (b) the notice of the Confirmation Hearing; (c) the Disclosure Statement (with a copy of the Plan attached as Exhibit A thereto); (d) an appropriate form of Ballot and a Ballot return envelope; and (e) letters from the Debtors and the Official Committee of Unsecured Creditors (the "Committee") recommending acceptance of the Plan.

14. The deadline for voting on the Plan was established as 12:00 noon (ET) on April 7, 2006. The Affidavit of Service of Brendan Halley, Notice Coordinator, The Trumbull Group, LLC, as the Court-appointed claims and balloting agent in the Cases (the "Balloting Agent"), (Doc. No. 1754), demonstrates that the Balloting Agent complied with the service requirements of the Solicitation Procedures.

---

[6] The amendments include, without limitation, (a) Plan modifications filed on February 24, 2006 (Doc. No. 1603), March 2, 2006 (Doc. No. 1628), April 17, 2006 (Doc. No. 1863), and May 31, 2006 (Doc. No. 2114); (b) Plan Supplements, filed on April 12, 2006 (Doc. No. 1836); May 2, 2006 (Doc. No. 1963); May 12, 2006 (Doc. No. 2002), and May 18, 2006 (Doc. No. 2029); and (c) Executory Contract Lists (as part of the Plan Supplements), filed on March 28, 2006 (Doc. Nos. 1758, 1759, 1760, 1761, 1764, and 1765), April 12, 2006 (Doc. No. 1835), April 13, 2006 (Doc. No. 1841), April 18, 2006 (Doc. Nos. 1874 and 1878), April 19, 2006 (Doc. No. 1881), April 26, 2006 (Doc. No. 1932), May 11, 2006 (Doc. No. 1989), May 19, 2006 (Doc. No. 2030), and May 31, 2006 (Doc. No. 2108).

II. BALLOT RESULTS

15. As evidenced by the Declaration of William R. Gruber, Jr. Certifying Tabulation of Ballots Regarding Vote on Debtors' First Amended Joint Plan of Reorganization ("Gruber Declaration"), filed on April 13, 2006 (Doc. No. 1842), all Classes of Claims entitled to vote accepted the Plan, as follows:

In Classes 2C through 2F, 100% in number and 100% in amount voted to accept the Plan;

In Class 3C, 99% in number and 99% in amount voted to accept the Plan;

In Class 3D, 100% in number and 100% in amount voted to accept the Plan;

In Class 3E, 98% in number and 99% in amount voted to accept the Plan; and

In Class 3F, 87% in number and 75% in amount voted to accept the Plan.

III. PLAN OBJECTIONS

A. *Objections Not Related to the Custodial Trust*

16. The deadline for filing and serving objections to the Plan (other than the provisions of the Plan relating to Funding of the Custodial Trust) (the "Preliminary Objections") was 12:00 noon (ET), April 7, 2006.[7] Arguments on any unresolved Preliminary Objections were heard by the Bankruptcy Court at the hearing on confirmation of the Plan, on April 19, 2006 (the "Initial Confirmation Hearing").

17. Preliminary Objections were filed by, respectively, the United States of America on behalf of the Internal Revenue Service (the "IRS Objection") (Doc. No. 1789); the Colorado Department of Public Health and Environment (the "Colorado Objection") (Doc. No. 1829); Gold Fields Mining, LLC, jointly with Blue Tee Corp. (the "Blue Tee Objection") (Doc. No.

[7] The Debtors agreed to extend the deadline for the United States Government to file an Objection as to any issues other than Custodial Trust issues to April 14, 2006, and for Custodial Trust Issues to April 21, 2006. Subsequently, this deadline was extended to May 24, 2006, by the Pre-Hearing Scheduling Order for Continued Confirmation Hearing, entered May 8, 2006. (Doc. No. 1983.)

1811); the United States of America on behalf of the Environmental Protection Agency, the United States Department of Interior Fish and Wildlife Service and the Forest Service of the United States Department of Agriculture (the "USEPA Objection") (Doc. No. 1854); and the Missouri Department of Natural Resources (the "Missouri Objection") (Doc. No. 1856).

18. The IRS Objection and the Colorado Objections were resolved consensually, pursuant to, respectively, the Joint Stipulation Resolving the United States of America's Objection to Confirmation of the Debtors' First Amended Joint Plan of Reorganization (Doc. No. 1851), and the Stipulation and Agreed Order between Debtors-in-Possession and the Hazardous Materials and Waste Management Division of the Colorado Department of Public Health and Environment Resolving Objection to Debtors' First Amended Joint Plan of Reorganization (Doc. No. 1908).

19. The Missouri Objection stated three bases for objecting to confirmation of the Plan: (a) the Plan impermissibly provided for a two step transaction with a sale of real property (including certain real property in the State of Missouri (the "Missouri Property")) by the Debtors to the Plan Trust and then a sale by the Plan Trust to the appropriate NewCo(s); (b) the Plan anticipated that the proposed sale of the Missouri Property to the Plan Trust would occur prior to completion of the transfer of the state-issued environmental permit for that property to the appropriate NewCo(s); and (c) the Plan provided for the potential transfer of the Missouri Property to the appropriate NewCo(s) free and clear of the environmental obligations imposed by the State of Missouri. The Debtors filed a response to the Missouri Objection on April 17, 2006 (the "Missouri Response") (Doc. No. 1862), whereby they stated that the Plan had previously been amended to address the issues raised in the Missouri Objection. No representative of the State of Missouri attended the Initial Confirmation Hearing. As a result of the filing of the

Missouri Response, the Missouri Objection has been overruled by the Bankruptcy Court as moot, pursuant to the Order re Objections to Confirmation (the "Initial Objection Order"), dated May 5, 2006 (Doc. No. 1976).

20. The Blue Tee Objection and the U.S. EPA Objection together asserted the following objections to confirmation of the Plan: (a) section 12.01(a) of the Plan provided a discharge to the Debtors under a liquidating Plan in contravention of section 1141(d) of the Bankruptcy Code; (b) section 12.01(a) of the Plan provided a discharge of future claims against the Debtors, in violation of section 1141(d) of the Bankruptcy Code; (c) the language in section 12.01(a) of the Plan was designed to discharge certain environmental regulatory obligations that were not dischargeable "claims" for purposes of section 1141(d) of the Bankruptcy Code; (d) the language in section 12.01(d) of the Plan unlawfully provided a release of future claims against, among others, the Debtors, their Estates, New HoldCo and the NewCos; (e) the language of section 12.01(d) unlawfully released and discharged claims against various non-Debtor third parties; (f) the Recovery Model set forth in the Plan was improper and did not comply with the "best interests of the creditors" test under 11 U.S.C. § 1129(a)(7); (g) the Plan was not feasible because it did not provide for sufficient funding of the Custodial Trusts; and (h) miscellaneous Untied States' Objections.

21. The Debtors filed written responses to each of the Blue Tee Objection and the U.S. EPA Objection on, respectively April 14, 2006 (the "Blue Tee Response") (Doc. No. 1843) and April 17, 2006 (the "U.S. EPA Response") (Doc. No. 1862). Argument on the Blue Tee Objection, the Blue Tee Response, the U.S. EPA Objection and the U.S. EPA Response (other than on issues relating to the Initial Custodial Trust Objections, as defined below) were heard at the Initial Confirmation Hearing.

22. Following the Initial Confirmation Hearing, the Debtors have made certain amendments to the Plan, including, without limitation, sections 12.01(a), 12.01(b) and 12.01(d) of the Plan, which have resolved or rendered moot the portions of the Blue Tee Objection and the U.S. EPA Objections relating to the scope of discharges and releases granted under those sections (the "Discharge Objections"). As a result, the relevant portions of the Discharge Objections have been resolved pursuant to the Stipulation and Agreed Order among Debtors-in-Possession, Gold Fields Mining LLC, Blue Tee Corporation, the United States of America on behalf of the Environmental Protection Agency, the United States Department of the Interior Fish and Wildlife Service and the Forest Service of the United States Department of Agriculture Resolving, in part, Certain Objections to Debtors' First Amended Joint Plan of Reorganization, as Modified (Doc. No. 2120), entered by the Bankruptcy Court on dated May 31, 2006.

23. In addition, pursuant to the Initial Objection Order, the Bankruptcy Court overruled the portion of the Blue Tee Objection and the U.S. EPA Objection asserting that the Recovery Model was improper and failed to comply with section 1129(a)(7) of the Bankruptcy Code. Pursuant to the Initial Objection Order, the Bankruptcy Court found that the Debtors met their burden of proof with regard to the fairness of the Recovery Model and that the Recovery Model satisfies the best interest test of section 1129(a)(7) of the Bankruptcy Code.

24. No arguments were heard at the Initial Confirmation Hearing in connection with the portions of the Blue Tee Objection and the U.S. EPA Objection relating to the adequacy of Funding for the Custodial Trusts (the "Initial Custodial Trust Objections"). Instead, the Bankruptcy Court held these objections in abeyance until the continued hearing on the confirmation of the Plan, which occurred on June 1, 2 and 5, 2006 (the "Continued Confirmation Hearing"). Additionally, the Objections of the United States set forth in Paragraph 22 of the U.S.

EPA Objection and Paragraph 20 of the USEPA Custodial Trust Objection (defined below) were held in abeyance.

B. Objections to the Funding of the Custodial Trusts

25. On May 12, 2006, the Debtors filed a revised supplement to the Plan, providing a method for the timing and amount of the Funding for the Custodial Trusts. The deadline for the United States Environmental Protection Agency (the "U.S. EPA") and the state environmental protection agencies (together with the U.S. EPA, the "Environmental Parties"), or other parties, to file and serve objections to the Debtors' proposed Funding or the terms of the Custodial Trust and any related documents (together with the Initial Custodial Trust Objections, the "Custodial Trust Objections") was 12:00 midnight (ET) on May 24, 2006. The deadline for the Debtors to file and serve any responses to the Custodial Trust Objections was 4:00 p.m. (ET) on May 30, 2006.

26. On May 15, 2006, the Debtors filed the Declaration of Gary F. Vajda, P.E. in Support of Confirmation of Debtors First Amended Joint Plan of Reorganization, as Modified (Doc. No. 2009) (the "Vajda Report"). Also on May 15, 2006, the U.S. EPA filed its Scope of Work and Cost Estimate for the Eagle-Picher [sic] Sites (Doc. No. 2012) (the "Agency SOW").

27. At 12:30 a.m. on May 25, 2006, the U.S. EPA filed its Supplemental Objection of the United States of America to Confirmation of Debtors' First Amended Joint Plan of Reorganization on Custodial Trust Issues ("USEPA Custodial Trust Objection"). (Doc. No. 2053.) Pursuant to the USEPA Custodial Trust Objection, the U.S. EPA disputed the Debtors' proposed Funding of the EPA Custodial Trust for six sites located in the States of Michigan and Ohio.[8] None of the other Environmental Parties, nor any other party, filed an objection to the

[8] At the time USEPA Custodial Trust Objection was filed, the Debtors had reached agreements with the U.S. EPA and the relevant states as to the adequate amount of Funding for all sites located in the

Funding of the Custodial Trust or any other matters pertaining to the Custodial Trust. On May 30, 2006, the Debtors filed the Debtors' Brief in Response to Supplemental Objection of the United States of America to Confirmation of Debtors' First Amended Joint Plan of Reorganization on Custodial Trust Issues. (Doc. No. 2106.)

28. At the Continued Confirmation Hearing, the Bankruptcy Court heard testimony of witnesses presented by each of the Debtors and the U.S. EPA in support of the proposed Funding amounts the Debtors and the U.S. EPA, respectively, deemed to be appropriate for the sites at Sidney, Ohio (the "Sidney Site") and Urbana, Ohio (the "Urbana Site" and, together with the Sidney Site, the "Ohio Sites"). The Debtors presented the expert opinion of Gary Vajda, in support of its proposed Funding. The U.S. EPA elicited testimony from Paul Harper, an employee of the Debtors, Jon Gulch of the U.S. EPA, and Michael Starkey of the Ohio Environmental Protection Agency. In addition, the Court received into evidence, without objection, the declaration and report of Michael Kendzior. On June 13, 2006, the Court issued the Order Re: Objections to Confirmation on Custodial Trust Issues [Doc. No. 2158] (the "June 13 Order"), which overruled in part and granted in part the USEPA Custodial Trust Objection. The June 13 Order provides for funding of the custodial trust account for the Urbana Site in the amount of $45,000 and funding for the custodial trust account for the Sidney Site in the amount of $1,080,000.

IV. SPECIFIC CONFIRMATION REQUIREMENTS

States of Illinois, Kansas and Oklahoma. The six remaining sites (for which no agreements had been reached as to Funding) were located in Michigan (four sites) and Ohio (two sites). Late on the evening prior to the commencement of the Continued Confirmation Hearing, the Debtors reached an agreement with the U.S. EPA and the State of Michigan regarding the Funding to be provided in connection with the four Michigan sites. Evidence was heard at the Continued Confirmation Hearing regarding the proposed Funding for the two Ohio sites (located in Urbana, Ohio and Sidney, Ohio).

29. Pursuant to section 1129(a) of the Bankruptcy Code, the Court shall confirm a chapter 11 plan if the requirements of the thirteen subsections of section 1129(a) are met. To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan complies with the provisions of section 1129(a) by a preponderance of the evidence. *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.)*, 994 F.2d 1160, 1165 (5th Cir.), *cert. denied*, 510 U.S. 992 (1993); *In re Dow Corning Corp.*, 270 B.R. 393, 402 (Bank. E.D. Mich. 2001); *In re Future Energy Corp.*, 83 B.R. 470, 481 (S.D. Ohio 1988); *In re Mallard Pond Ltd.*, 217 B.R. 782, 785 (Bankr. M.D. Tenn. 1997).

30. Nevertheless, if a plan fails to meet the requirements under section 1129(a)(8) (requiring all impaired classes to accept the plan), the plan still shall be confirmed if it complies with section 1129(b) of the Bankruptcy Code. 11 U.S.C. § 1129(b).

31. Under section 1129(b) of the Bankruptcy Code a plan shall be confirmed without the affirmative acceptance of an impaired class or classes if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b) (1)-(2).

32. The following discussion demonstrates that the Plan meets these requirements.

A. Section 1129(a)(1) – Compliance with Code Provisions

33. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the "applicable provisions" of Title 11. 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) reveals that this provision embodies the requirements of, among others, sections 1122 and 1123 of the Bankruptcy Code, governing the classification of claims and the contents of the plan respectively. H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978). *See Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 648-49 (2d Cir. 1988) (stating that "the legislative history of subsection 1129(a)(1)

suggests that Congress intended the phrase 'applicable provisions' in this subsection to mean provisions of Chapter 11 that concern the form and content of reorganization plans").

34. In determining whether a plan complies with section 1129(a)(1), it is appropriate to begin the analysis with section 1122 of the Bankruptcy Code, which governs classification of claims, and section 1123(a)(1) of the Bankruptcy Code, which sets forth certain required provisions that a plan must contain.

1. Section 1122 and 1123(a)(1) – Designation of Classes of Claims and Interests

a. Findings of Fact

35. The Plan and related documentation constitute all pertinent elements of the Debtors' proposed restructuring and the Plan.

36. Article 2 of the Plan sets forth the treatment of the following unclassified Claims[9]: (a) Allowed Administrative Expense Claims; (b) Fees of Professionals; (c) Indenture Trustee Fees; (d) Priority Tax Claims; (e) Other Priority Claims; and (f) Debtor in Possession Financing.

37. Article 3 of the Plan sets forth the classification of Claims and Equity Interests as follows:

(a) Unimpaired Classes of Claims (not entitled to vote on the Plan, deemed to have accepted the Plan under 11 U.S.C. § 1126(f)

(i) Class 1: Allowed Secured Lender Claims;

(b) Impaired Classes of Claims (entitled to vote on the Plan):

(i) Class 2C—Pre-Petition Note Claims against EPT;

(ii) Class 2D—Pre-Petition Note Claims against EPPHS;

(iii) Class 2E—Pre-Petition Note Claims against EPFM;

[9] Pursuant to 11 U.S.C. § 1123(a)(1), Administrative Expense Claims, Professional Fee and Expense Claims, and Priority Tax Claims are not required to be classified.

(iv) Class 2F—Pre-Petition Note Claims against the Hillsdale Debtors;

(v) Class 3C—Other Unsecured Claims against EPT;

(vi) Class 3D—Other Unsecured Claims against EPPHS;

(vii) Class 3E—Other Unsecured Claims against EPFM; and

(viii) Class 3F—Other Unsecured Claims against the Hillsdale Debtors.

(c) Impaired Classes of Claims (not entitled to vote on the Plan, deemed to have rejected the Plan under 11 U.S.C. § 1126(g)):

(i) Class 2A: Pre-Petition Note Claims against Holdings;

(ii) Class 2B: Pre-Petition Note Claims against EPI;

(iii) Class 3A: Other Unsecured Claims against Holdings; and

(iv) Class 3B: Other Unsecured Claims against EPI.

(d) Impaired Class of Interests (not entitled to vote on the Plan, deemed to have rejected the Plan under 11 U.S.C. § 1126(g):

(i) Class 4: Equity Interests.

Class 1 (Secured Claims)

38. Class 1 under the Plan is comprised of Secured Claims. Class 1 is Unimpaired. Due to the nature of the Class 1 Claims and the unique collateral for the Class 1 Claims, there are valid and sufficient business reasons to classify Class 1 Claims separate from the other Classes of claims in the Plan.

Class 2 (Pre-Petition Note Claims)

39. Class 2 under the Plan is comprised of the Pre-Petition Note Claims, i.e. the claims of holders of the 9-3/4% Senior Notes Due 2013, issued by Debtor EPI and guaranteed by certain subsidiaries and affiliates of EPI and Holdings. Class 2 is Impaired under the Plan. Due to the nature of the Class 2 Claims, there are valid and sufficient business reasons to classify Class 2 Claims separate from the other Classes of claims in the Plan.

40. Classes 2A – 2F are properly treated as separate under the Plan. Because none of the non-Hillsdale Debtors is substantively consolidated under the Plan, each of Classes 2A- 2F will realize different recovery amounts based on the asset valuation and debt allocation for the Debtor against whom the claims in that Class have been filed.[10]

Class 3 (Other Unsecured Claims)

41. Class 3 under the Plan is comprised of the Unsecured Claims of creditors other than those in Class 2. Class 3 is Impaired. Due to the nature of the Class 3 Claims, there are valid and sufficient business reasons to classify Class 3 Claims separate from the other Classes of claims in the Plan.

42. Classes 3A – 3F are properly treated as separate under the Plan. Because none of the non-Hillsdale Debtors is substantively consolidated under the Plan, each of Classes 3A- 3F will realize different recovery amounts based on the asset valuation and debt allocation for the Debtor against whom the claims in that Class have been filed.

Class 4 (Equity Interests)

43. Class 4 under the Plan is comprised of holders of Equity Interests. Class 4 is Impaired. The Plan provides that holders of Allowed Class 4 Equity Interests will receive no distribution on account of such interests. Due to the different legal character of Equity Interests in Class 4, there are valid and sufficient business reasons to classify the Equity Interests in Class 4 separately from the other Classes in the Plan.

44. No party has objected to the classification of Claims and Equity Interest under the Plan.

---

[10] The Holders of Allowed Claims in Classes 2F (Prepetition Note Claims against the Hillsdale Debtors) and 3F (Other Unsecured Claims against the Hillsdale Debtors) will receive Distributions based on the consolidated asset value and debt allocation for the three Hillsdale Debtors.

45. The Plan's classification of Claims and Equity Interests is reasonable and necessary to implement the Plan. Separate classification of Secured Claims, Pre-Petition Note Claims, Other Unsecured Claims and Equity Interests, as well as separate classification of all Claims and Equity Interests on a Debtor-by-Debtor basis (except for the Hillsdale Debtors), is proper because these Claims and Equity Interests differ in legal and factual nature.

b. Conclusions of Law

46. Section 1123(a)(1) of the Bankruptcy Code requires that a plan classify all claims (with the exception of certain priority claims) and all interests, and that such classification comply with section 1122 of the Bankruptcy Code. 11 U.S.C. §§ 1123(a)(1) and 1122.

47. Section 1122(a) of the Bankruptcy Code provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). Plan proponents, such as the Debtors and the Committee, have significant flexibility in classifying claims under section 1122, as long as a reasonable legal and/or factual basis exists for the classification, and all claims within a particular class are substantially similar. *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 586 (6th Cir. 1986) (noting court's "broad discretion" to determine proper classifications).

48. Section 1122(a) "only addresses the problem of dissimilar claims being included in the same class." *U.S. Truck Co.*, 800 F.2d at 585. "Section 1122(a) does not demand that all similar claims be in the same class." *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 661 (6th Cir. 2002). *See In re Snyder's Drug Stores, Inc.*, 307 B.R. 889 (Bankr. N.D. Ohio 2004).

49. No party objected to confirmation of the Plan on the basis of failure to comply with sections 1122 and 1123(a)(1) of the Bankruptcy Code.

50. The Plan complies with sections 1122 and 1123(a)(1) of the Bankruptcy Code. The Plan's classification of Claims and Equity Interests is reasonable and necessary to implement the Plan. Separate classification of Secured Claims, Pre-Petition Note Claims, Other Unsecured Claims and Equity Interests is proper because these Claims and Equity Interests differ in legal and factual nature. No provision of the Plan provides for relief beyond what is permissible under the Bankruptcy Code.

2. Section 1123(a)(2) – Specification of Unimpaired Classes

a. Findings of Fact

51. Article 4 of the Plan summarizes all Classes of Claims and Equity Interests and states whether they are impaired or unimpaired under the Plan.

b. Conclusions of Law

52. Section 1123(a)(2) of the Bankruptcy Code requires that a plan specify any class of claims or interests that is not impaired under the plan.

53. No party objected to confirmation of the Plan on the basis of failure to comply with sections 1122 and 1123(a)(2) of the Bankruptcy Code.

54. The Plan meets the requirements of section 1123(a)(2) of the Bankruptcy Code.

3. Section 1123(a)(3) – Treatment of Claims within Classes

a. Findings of Fact

55. Article 4 of the Plan sets forth the treatment of impaired Classes of Claims and Equity Interests under the Plan.

b. Conclusions of Law

56. Section 1123(a)(3) of the Bankruptcy Code requires that the Plan "specify the treatment of any class of claims or interests that is impaired under the plan."

57. No party objected to confirmation of the Plan on the basis of failure to comply with sections 1122 and 1123(a)(3) of the Bankruptcy Code.

58. The Plan properly specifies the treatment of all impaired Classes of Claims and Equity Interests under the Plan, and satisfies section 1123(a)(3).

4. Section 1123(a)(4) –Non-discrimination Within Classes of Claims or Interests

a. Findings of Fact

59. Article 4 of the Plan provides for treatment of Classes of Claims and Equity Interests. Each holder of an Allowed Claim or Equity Interest within a given Class receives identical treatment of its Claim or Equity Interest under the Plan.

b. Conclusions of Law

60. Section 1123(a)(4) of the Bankruptcy Code requires that a Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4).

61. No party objected to confirmation of the Plan on the basis of failure to comply with sections 1122 and 1123(a)(4) of the Bankruptcy Code.

62. Because the Plan provides for the same treatment of each Allowed Claim or Equity Interest in each respective Class, unless the holder of a particular Allowed Claim or Equity Interest has agreed to less favorable treatment of such Allowed Claim or Equity Interest, section 1123(a)(4) of the Bankruptcy Code has been satisfied.

5. Section 1123(a)(5) – Adequate Means for Plan Implementation

a. Findings of Fact

63. Article 5 of the Plan provides adequate and reasonable means for implementation of the Plan.

64. Section 5.01 of the Plan provides for the formation of New HoldCo and the NewCos for the purpose of acquiring the Transferred Assets of the Debtors. The NewCos will operate their businesses as separate legal entities independent and distinct from the Debtors.[11]

65. Section 5.02 of the Plan provides for the transfer of the Transferred Assets to New HoldCo and the NewCos, in accordance with, and as contemplated by sections 363, 1123, 1129, and 1141 of the Bankruptcy Code.

66. Section 5.04 of the Plan provides that the New HoldCo Common Stock shall be authorized and delivered to the Debtors, together with other Plan Consideration, in exchange for the Transferred Assets, which securities shall be exempt from registration under the securities laws under Regulation D and, to the extent applicable, section 1145 of the Bankruptcy Code.

67. Section 5.09 of the Plan provides for the vesting of the Transferred Assets in the appropriate NewCo, free and clear of all Liens, Claims, encumbrances, and Other Interests.

68. Section 5.07 of the Plan provides for financing pursuant to the Exit Financing Facilities. Such facilities shall be used, *inter alia*, as Plan Consideration, to fund the Custodial Trust in the amounts determined by the Bankruptcy Court and to provide working capital for the NewCos and New HoldCo.

69. Sections 5.10 and 5.14 of the Plan provide for the assumption and assignment to New HoldCo and the NewCos of the employee pension and benefit plans and the management incentive plan.

---

[11] These findings of fact contain summaries of various sections of the Plan, including the releases and exculpation included in Article 12 of the Plan. These summaries are not intended to be exclusive or all-inclusive, and to the extent of any conflict between the terms and conditions of these findings of fact and those in the Plan, except to the extent expressly set forth in the Confirmation Order, the terms and conditions of the Plan shall control and govern.

70. Section 5.12 of the Plan provides that, on the Effective Date, certain environmentally impacted real property owned by the Debtors (defined in the Plan as either "Designated Property" or "Transitional Property") will be transferred into the EP Custodial Trust, which will take title to the Designated Property and the Transitional Property pursuant to the terms of the Custodial Trust Agreement.

71. As set forth in section 5.12:

(a) The Designated Property is not necessary to the operation of the Debtors' businesses.

(b) The Designated Property and the Transitional Property will not be included in the Transferred Assets to be sold to the NewCos.

(c) Neither New HoldCo nor any of the NewCos shall be, or be deemed to be, an owner, operator, trustee, partner, agent, shareholder, officer or director of the EP Custodial Trust, or an owner or operator of the Designated Property or an owner of the Transitional Property; provided, however, that nothing in the Plan shall relieve any entity of any liability from any new acts after the Effective Date creating liability under Environmental Laws and nothing in the Plan shall relieve any entity that operates or owns the Properties after the Effective Date from any liability under Environmental Laws as an operator or owner of the Properties after the Effective Date.

(d) Except as otherwise provided in the Plan, on the Effective Date, the Designated Property and the Transitional Property will be transferred to the EP Custodial Trust, which will take title to the Designated Property and the Transitional Property.

(e) Certain property currently titled in the name of EPI, located in Cherokee County, Kansas will be treated as property titled in the name of EPT (consistent with the pre-petition documentation governing the transfer of such property from EPI to EPT) and will be treated as EPT property for purposes of funding the EP Custodial Trust.

(f) The purpose of the EP Custodial Trust will be to (i) own the Designated Property and own and lease the Transitional Property, pursuant to the TP Leases; (ii) manage the Environmental Actions and fund the applicable Environmental Costs; (iii) where applicable, continue Environmental Actions currently underway at any of the Properties; (iv) implement the terms of any Pending Environmental Settlement Agreements with the Environmental Agencies; and (v) sell, transfer, or otherwise dispose of the

Designated Property and the Transitional Property to one or more third parties.

(g) The EP Custodial Trust will be administered by the Custodial Trustee pursuant to the terms and conditions of the Custodial Trust Agreement, which has been filed with the Court.

(h) The EP Custodial Trust will be funded in the total amount of $17,771,700 (the "Funding Amount"), which consists of the sum of (a) $13,646,000, representing the aggregate amount that the Debtors and the relevant Environmental Agencies have agreed will be funded to pay the Environmental Costs for the properties that are the subject of the Pending Environmental Settlement Agreements; (b) $1,125,000, representing the amount that the Bankruptcy Court has determined at the Final Confirmation Hearing is sufficient to pay the Environmental Costs for all the Designated Property located in the State of Ohio; and (c) $2,940,700, plus a holdback of up to fifteen percent of Residual Interests as provided in the Custodial Trust Agreement, representing the amount that the Debtors and U.S. EPA have agreed, for purposes of settlement, is sufficient to pay the administration costs of the EP Custodial Trust. The Funding Amount consists of the following:

(i) Environmental Costs associated with former EPT property located in Galena, IL - $1,150,000;

(ii) Environmental Costs associated with former EPT property located in Galena, KS - $6,560,000;

(iii) Environmental Costs associated with former EPT property located in Baxter Springs, KS - $349,000;

(iv) Environmental Costs associated with former EPT property located in Columbus/Treece, KS - $282,000;

(v) Environmental Costs associated with former EPT property located in Miami, OK - $600,000;

(vi) Environmental Costs associated with former EPT property located in Hockerville, OK - $105,000;

(vii) Environmental Costs associated with former EPI property located in River Rouge, MI - $700,000;

(viii) Environmental Costs associated with former Hillsdale Debtors property located in Hillsdale, MI (Industrial Drive) - $1,600,000;

(ix) Environmental Costs associated with former Hillsdale Debtors property located in Hillsdale, MI (South Street) - $800,000;

(x) Environmental Costs associated with former EPI property located in Inkster, MI - $1,500,000;

(xi) Environmental Costs associated with former EPI property located in Urbana, OH - $45,000;

(xii) Environmental Costs associated with former EPI property located in Sidney, OH - $1,080,000; and

(xiii) Other costs of administration for the EP Custodial Trust - $2,940,700, plus a holdback of up to fifteen percent of Residual Interests as provided in the Custodial Trust Agreement.

(i) Funding shall consist of Cash Funding of $4,266,699.88 in cash and $12,255,077 in Letters of Credit, and Lease Funding of $1,189,923.12, generated from the leasing of the Transitional Properties to one or more of the NewCos, pursuant to the TP Leases.

(j) The Funding of the EP Custodial Trust shall constitute an administrative expense of, respectively, EPI, EPT, and the Hillsdale Debtors.

(k) On or about the Effective Date, (i) the Debtors will deposit the Cash Funding in the respective Custodial Trust Accounts established by the Custodial Trustee pursuant to the terms of the Custodial Trust Agreement, and (ii) the Custodial Trustee and the applicable NewCos will execute the TP Leases.

(l) Except as otherwise provided for in the Custodial Trust Agreement or the Settlement Agreements, from and after the Effective Date, until the date on which the Plan Trust terminates, any Over Funding of, or Residual Interest in, the EP Custodial Trust will be granted to the Plan Trust for the benefit of the holders of Unsecured Claims against the Debtor who owned the Designated Property or Transitional Property from which the Over Funding or Residual Interest was generated, on a pro rata basis.

(m) From and after the date on which the Plan Trust terminates, any remaining Residual Interest in the EP Custodial Trust will be granted to the States in which the Designated Property and/or Transitional Property is located. If a state rejects its share of a Residual Interest, then the Residual Interest will revert to the county government in which such Designated Property or Transitional Property is located, and thereafter to a charity designated by the Custodial Trustee, in his sole discretion.

(n) The Custodial Trust Accounts are intended to be treated as either a "qualified settlement fund" as that term is defined in Treasury Regulation section 1.468B-1, or as a "disputed ownership fund" as that term is defined in Treasury Regulation section 1.468B-9.

(o) The EP Custodial Trust, the Custodial Trustee, New HoldCo and the NewCos, and their respective affiliates, subsidiaries, parents, members, shareholders, officers, directors, managers, employees, consultants, lenders, agents, attorneys, or other professionals and representatives shall be accorded under the Plan and Confirmation Order the broadest protection available under law with respect to any and all liability related to or in connection with the Designated Property, Transitional Property, and the EP Custodial Trust, including, but not limited to, CERCLA § 107(n), 42 U.S.C. § 9607(n); O.R.C. § 3746.27(A) (Ohio); 415 ILCS 5/22.2(h)(2)(D) (Illinois); MCL § 324.20101-20101b (Michigan); Mo. R.S. § 427.031 (Missouri); and KS § 65-352, et seq. (Kansas).

72. The Funding Amounts, which amounts the Court has determined, and, in the case of Designated Property and Transitional Property located in the States of Kansas, Oklahoma, Illinois and Michigan, with respect to which the Debtors and the United States Environmental Protection Agency ("USEPA") and the States of Kansas, Oklahoma, Illinois and Michigan, have agreed as set forth in the Settlement Agreements, are sufficient for settlement purposes to pay the Environmental Costs of such properties and to administer the EP Custodial Trust. By causing the Funding Amounts to be made available to the Custodial Trustee, the Debtors will satisfy section 5.12(c) of the Plan.

73. The Debtors have reached proposed settlement agreements related to the Designated Property and Transitional Property located in the States of Kansas, Oklahoma, Illinois, and Michigan with U.S. EPA and the Kansas Department of Health and Environment, Oklahoma Department of Environmental Quality, Illinois Environmental Protection Agency and Michigan Department of Environmental Quality (the "Pending Environmental Settlement Agreements"). These Findings of Fact and Conclusions of Law shall not be construed as constituting the Bankruptcy Court's approval of the Pending Environmental Settlement Agreements. Approval of the Pending Environmental Settlement Agreements shall be a condition subsequent to confirmation of the Plan and a condition precedent to the occurrence of the Effective Date of the Plan.

74. The Custodial Trust Agreement provides for William L. West to be appointed as the Custodial Trustee.

75. The Custodial Trust Agreement has been negotiated among the Debtors, the Committee, the United States Department of Justice on behalf of the U.S. EPA (the "United States"), the relevant State environmental agencies (other than Ohio) (the "States"), and William West, the proposed Custodial Trustee; the Committee, United States, States and the proposed Custodial Trustee have no objection to the form and terms of the Custodial Trust Agreement.

76. Section 5.13 of the Plan, together with the relevant Plan Supplement documents, provide the timing and process for dissolution of the Debtors after the Effective Date.

77. Section 5.15 of the Plan provides that Estate Causes of Action, other than those actions expressly included in the Transferred Assets, shall be assigned to a Plan Trust. Holders of Allowed Pre-Petition Note Claims and Allowed Other Unsecured Claims will be eligible to receive pro rata distributions of any proceeds obtained from pursuit of the Estate Causes of Action relating to the Debtor against which they hold an Allowed Claim.

78. Section 5.16 of the Plan provides that, except as otherwise provided in the Plan or Confirmation Order, all injunctions or stays pursuant to sections 105 or 362 of the Bankruptcy Code shall remain in full force and effect until the Effective Date of the Plan.

79. Except as otherwise provided in Article 10 of the Plan, the Plan provides for the assumption of all executory contracts and unexpired leases, including, without limitation, the Debtors' Collective Bargaining Agreements ("CBAs") with various labor unions and the Debtors' pension and benefit plans as described in section 5.14 of the Plan.

80. Article 12 of the Plan provides for, among other things, a release of certain claims by creditors against, among others, the Debtors, the Committee and its members, New HoldCo

and the NewCos, the Senior Replacement DIP Agent, Senior Replacement DIP Lenders, Junior Replacement DIP Agent and Junior Replacement DIP Lenders and each of their directors and officers, employees. attorneys, accountants, underwriters, investment bankers, financial advisors and agents (subject to certain exceptions, including claims arising from fraud, willful misconduct, or gross negligence). The Plan also provides for the discharge and release by the Debtors of certain claims against the officers, directors and employees of the Debtors, the Committee members, and each of their respective directors, officers, employees, attorneys, accountants, underwriters, investment bankers, financial advisors and agents.

81. Section 12.04 of the Plan provides, among other things, that nothing in the Plan (including, without limitation, Article 5), the Purchase Agreements or the Confirmation Order shall release, discharge, enjoin, or preclude any Person who filed a written objection to confirmation of the Plan within the time provided for in the Disclosure Statement Order or any Governmental Unit from asserting against any party any Claim arising after the Effective Date of the Plan.

b. Conclusions of Law

82. Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means" for its implementation and sets forth specific examples of such adequate means, including, but not limited to: (a) retention by the debtor of all or any part of the property of the estate; (b) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan; (c) merger or consolidation of the debtor with one or more persons; (d) cancellation or modification of any indenture or similar instruments; (e) amendment of the debtor's charter; (f) issuance of new securities; (g) sale by the debtor of all or any part of property of the estate; (h) or satisfaction or modification of any lien.

83. A chapter 11 debtor has broad discretion with respect to the means of implementing a plan of reorganization. *See In re XOFOX Ind., Ltd.*, 241 B.R. 541, 542 (Bankr. E.D. Mich. 1999) (while section 1125(a)(5) clearly mandates that the plan include means for implementation that are adequate, it does not purport to dictate what means are to be used). Means that are otherwise adequate may be included as long as they are appropriate and not inconsistent with the applicable provisions of the Bankruptcy Code. *State of Maryland, et al. v. Antonelli Creditors' Liquidating Trust, et al.*, 123 F.3d 777 (4th Cir. 1997). Section 1123(a)(5), however, requires some means by which the debtor may repay its debts. *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985).

84. Article 5 of the Plan provides a clear and reasonable procedure for its implementation, and satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

85. The provisions of section 5.12 of the Plan, relating to the EP Custodial Trust, including, without limitation, provisions relating to: (i) the transfer on the Effective Date of the Designated Property and the Transitional Property to the EP Custodial Trust; (ii) the vesting of title to the Designated Property and the Transition Property in the EP Custodial Trust; (iii) the transfer on the Effective Date of the Cherokee Property to the EP Custodial Trust and the treatment of that property as EPT property for purposes of the Funding and otherwise; (iv) the administration of the EP Custodial Trust by the Custodial Trustee; (v) the management of Environmental Actions and funding of the Environmental Costs relating to the Designated Property and the Transitional Property by the Custodial Trustee, on behalf of the EP Custodial Trust; (vi) the continuation, by the Custodial Trustee, of Environmental Actions at any of the Designated Properties or Transitional Properties; (vii) the Custodial Trustee's implementation of the terms of the Pending Environmental Settlement Agreements; (viii) the management, sale,

transfer and/or other distribution of the Designated Property and the Transitional Property by the Custodial Trustee; (ix) the leasing of the Transitional Property to one or more of the NewCos pursuant to the TP Leases; (x) the Funding of the Custodial Trust Accounts in accordance with the June 13 Order, the Plan and this Confirmation Order to pay Environmental Costs for the Designated Property and the Transitional Property and to administer the EP Custodial Trust; and (xi) additional protections from liability provided to the EP Custodial Trust, the Custodial Trustee, New HoldCo and the NewCos pursuant to section 5.12(j) of the Plan and the Confirmation Order, are fair and reasonable and provide adequate means of implementing the Plan under section 1123(a)(5) of the Bankruptcy Code, with respect to the Designated Property and the Transitional Property.

86. The Plan complies with section 1123(a)(5) of the Bankruptcy Code.

6. Section 1123(a)(6) – Required Charter Amendments

a. Findings of Fact

87. The Plan does not contemplate reorganized Debtors and, therefore, there are no charter amendments with respect to the Debtors' corporate governance. In accordance with section 5.01 of the Plan, the Plan provides for the formation of New HoldCo and the subsidiary NewCos, the charter documents for which are not governed by section 1123(a)(6) of the Bankruptcy Code.

88. Pursuant to section 11.01 of the Plan, certain of the charter documents of New HoldCo have been filed with the Plan Supplement, on April 12, 2006 (Doc. No. 1836).[12]

b. Conclusions of Law

[12] The Debtors subsequently filed a second Plan Supplement (Doc. No. 1963) on May 2, 2006, a revised second Plan Supplement (Doc. No. 2002) on May 12, 2006 and a supplemental revised second Plan Supplement (Doc. No. 2029) on May 18, 2006.

89. Section 1123(a)(6) of the Bankruptcy Code requires that a Plan provide for the inclusion in a corporate debtor's charter or the charter of any corporation referred to in section 1123(a)(5)(B) or (C) of the Bankruptcy Code provisions (i) prohibiting the issuance of nonvoting equity securities, and (ii) providing for an "appropriate distribution" of voting power among those possessing voting power.

90. No party objected to confirmation of the Plan on the basis of failure to comply with sections 1122 and 1123(a)(6) of the Bankruptcy Code.

91. Because the Plan does not contemplate reorganized Debtors and there are no charter amendments to the Debtors' corporate governance, the provisions of section 1123(a)(6) of the Bankruptcy Code are not applicable.

7. Section 1123(a)(7) – Manner of Selection of Officers and Directors and Trustees

a. Findings of Fact

92. The Plan does not contemplate reorganized Debtors.

93. The Plan contains information regarding the formation and corporate governance of New HoldCo and the NewCos that is of relevance to the creditors that will be receiving the stock of those entities.

94. Section 11.01 and 11.02 of the Plan, by and through the Disclosure Statement, indicates that the initial Board of Directors for each of NewCos and New HoldCo will be comprised of eight directors, initially consisting of:

> Todd Arden, a Partner in the distressed securities group of Angelo Gordon & Company, L.P.;
>
> Richard P. Bermingham, former chief executive officer and director of Collins Foods/Sizzler, and current CEO of Bermingham Investors;

James J. Gaffney, former Chairman of the Board and Chief Executive Officer of General Aquatics, Inc. (successor to KDI Corporation) and Vice Chairman of Viking Pacific Holdings Ltd.;

Mark K. Holdsworth, a founding member and Managing Partner of Tennenbaum Capital Partners, LLC, and former Vice President, Corporate Finance, of US Bancorp Libra;

Edward D. Horowitz, President and CEO of SES-Americom, and former Executive Vice President of Citigroup;

Donald L. Runkle, Senior Executive Advisor for Solectron Corporation, and past Vice-Chairman of Delphi Corporation;

David L. Treadwell, President and Chief Operating Officer of the Hillsdale Debtors, Chief Operating Officer at EPI and EPFM, and past CEO of Oxford Automotive. Mr. Treadwell will serve as CEO of New HoldCo and may serve as an officer of other NewCos;

General Ronald W. Yates, General, USAF, Retired, an independent consultant to the aerospace industry after 35 years in the United States Air Force as a combat fighter pilot and test pilot;

b. Conclusions of Law

95. Section 1123(a)(7) of the Bankruptcy Code requires that the Plan's provisions with respect to the manner of selection of any director, officer, or trustee, or any successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy . . . ." 11 U.S.C. § 1123(a)(7).

96. No party objected to confirmation of the Plan on the basis of failure to comply with sections 1122 and 1123(a)(7) of the Bankruptcy Code.

97. The provisions of the Plan regarding the manner of selection of officers and directors for New HoldCo and the NewCos are consistent with the interests of creditors and equity security holders and with public policy, thereby satisfying section 1123(a)(7) of the Bankruptcy Code.

8. Section 1123(b)(3) – Discharge of All Claims and Interests and Releases/Representatives of the Estate

a. Injunction, Release and Exculpation Provisions Are Fair and Equitable under 1123(b)(3)(A) and 1141(d)

(i) Findings of Fact

98. Section 12.01(a) of the Plan sets forth the breadth of the Debtors' discharge and exculpation pursuant to section 1141 of the Bankruptcy Code. That section provides that all treatment provided under the Plan shall be in exchange for, and in complete satisfaction, settlement, discharge and/or release of, all Claims and Equity Interests, including, without limitation, all demands, and liabilities that arose before the Effective Date and all debts of the kind specified in sections 502(g), 502(h) or 502 (i) of the Bankruptcy Code, to the fullest extent permitted by Bankruptcy Code section 1141. Such discharge and/or release of Claims and Equity Interests shall occur upon the Effective Date.

99. Section 12.01(b) of the Plan enjoins all holders of Claims and Equity Interests, from and after the Effective Date, from, among other things, commencing or continuing any action or enforcing or recovering any judgment or award on any Claim or Interest against the Debtors, their Estates New HoldCo, the NewCos, the Plan Trust, the Plan Trustee, the EP Custodial Trust, the Custodial Trustee, any of their respective assets or properties, or any of their respective subsidiaries or successors that has been discharged or released pursuant to section 12.01(a) of the Plan.

100. Section 12.01(c) of the Plan provides for the general release by the Debtors of claims against their officers, directors and employees; the Committee and its members; the Senior Replacement DIP Agent, the Junior Replacement DIP Agent, the Senior Replacement DIP Lenders, the Junior Replacement DIP Lenders (collectively the "Lenders") and each of their respective directors, officers, employees, attorneys, accountants, underwriters, investment bankers, financial advisors, and agents.

101. Subsection 12.01(d) of the Plan provides for a general exculpation of the Debtors, their Estates, the Committee, New HoldCo, the NewCos, the Plan Trust, the Plan Trustees, the EP Custodial Trust and the Custodial Trustee and each of their present and former directors, shareholders, officers, members, representatives and employees, lenders, agents, attorneys, advisors, accountants, investment bankers and financial advisors from Claims, debts, rights causes of action, liabilities or Equity Interests relating to any act or omission of, or relating to, the Debtors in connection with or arising out of, (a) the Cases; (b) the pursuit of confirmation of the Plan; (c) the consummation of the Plan; (d) the administration of the Plan; or (e) the distribution of property under the Plan. Subsection 12.01(d) expressly limits the scope of such exculpation, barring releases of claims arising out of gross negligence, bad faith or willful misconduct. In addition, the exculpation is not applicable to persons or entities serving in their capacity as officers, directors, employees, advisors or professionals of the Debtors in connection with (a) money borrowed or obligations incurred by such person or entity; (b) employment contracts; (c) consulting contracts; and (d) receipt of transfers from the Debtors in connection with the acquisition of subsidiaries, business enterprises or other material assets. Nothing in section 12.01(d) modifies or alters the liability of the Debtors or their estates for any Allowed or pending Administrative Claims.

102. Section 12.04 of the Plan provides that nothing in the Plan (including, without limitation, Article 5), Purchase Agreements or Confirmation Order shall (a) release, discharge, enjoin, or preclude (i) any Person who filed a written objection to confirmation of the Plan within the time period provided for in the Order Approving Disclosure Statement in Support of Debtors' Second Amended Joint Plan of Reorganization, [doc. no. 1625] or any Governmental Unit (as defined in the Bankruptcy Code) from asserting against any party any Claim arising

after the Effective Date of the Plan; *provided, however,* that any such Person entitled to assert any such Claim shall not be precluded from asserting such Claim or be prejudiced solely by virtue of the preclusion of any other Person from asserting a Claim by any provisions of the Plan or Confirmation Order; or (ii) any liability or cause of action under police or regulatory laws that any Governmental Unit may have that is not within the definition of "claim" under 11 U.S.C. § 101(5); or (b) expand, limit, affect or restrict in any manner whatsoever any party with respect to defenses against, or rights with respect to, any Claims of the type set forth in Section 12.04(a) of the Plan.

103. All objections to the injunction, release and exculpation provisions contained in Article 12 of the Plan have been resolved between the Debtors and the objecting party/parties or have been overruled by the Bankruptcy Court.

(ii) Conclusions of Law

104. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a plan may provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate.

105. Section 1141(d) of the Bankruptcy Court states, in pertinent part:

> "confirmation of a plan ... discharges a debtor from any debt that arose before the date of such confirmation..."

106. The settlements and adjustments of claims contained in the injunction, release, and exculpation provisions in Article 12 of the Plan are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtors and their chapter 11 estates, and such provisions shall be effective and binding upon all persons and entities.

107. The third-party exculpation described in section 12.01(d) of the Plan, by Holders of claims and Equity Interests of the Committee, the Committee members, New HoldCo, the NewCos, the Plan Trust, Plan Trustee, the EP Custodial Trust, the Custodial Trustee and certain

of their professionals, including, among others, officers, directors, advisers, and employees, acting in such capacities, is allowable and appropriate under applicable law including, without limitation, section 1141 of the Bankruptcy Code.

108. Accordingly, the non-debtor exculpation contained in Article 12 of the Plan are fair and equitable and fall within the ambit of such releases and exculpation allowed by courts under sections 1123(b)(3)(A) and 1141(d) of the Bankruptcy Code.

b. The Plan Trust and the EP Custodial Trust Qualify as "Representatives of the Estate"

(i) Findings of Fact

109. Section 5.15 of the Plan provides that, as of the Effective Date, the Debtors will assign to the Plan Trust the right to prosecute, settle, and release all Estate Causes of Action, except for actions expressly included in the Transferred Assets. The Plan Trustee will prosecute, settle, and release such Estate Causes of Action as a "representative of the estate" under section 1123(b)(3)(B) of the Bankruptcy Code.

110. Likewise, section 5.12 of the Plan provides, *inter alia*, that, with exception described in the Plan, on the Effective Date, (a) all the Designated Property and the Transitional Property will be transferred to the EP Custodial Trust; (b) all property currently titled in the name of EPI, located in Cherokee County, Kansas, will be treated as real property of EPT for purposes of funding the EP Custodial Trust; and (c) the EP Custodial Trust will be administered by the Custodial Trustee pursuant to the terms of the Custodial Trust Agreement.

111. The purposes of the EP Custodial Trust are to (a) own the Designated Property and own and lease the Transitional Property, pursuant to the TP Leases; (b) manage the Environmental Actions and fund the applicable Environmental Costs of the Designated Properties and the Transitional Properties; (c) where applicable, continue the Environmental

Actions currently underway at any of the Designated Properties or the Transitional Properties; (d) implement the terms of the Pending Environmental Settlement Agreements; and (e) sell, transfer, or otherwise dispose of the Designated Property and the Transitional Property to one or more third parties.

112. Sections 5.12 and 5.15 of the Plan and the respective trust agreements expressly establish the trusts and appoint the Plan Trust and the Custodial Trust, respectively, to own and hold the properties and assets transferred to the respective trusts, make authorized distributions and otherwise consummate the transactions, actions and claims contemplated by the Plan and Custodial Trust Agreement.

113. Such actions by the Plan Trust (acting through the Plan Trustee) and the EP Custodial Trust (acting through the Custodial Trustee) are designed to, and likely will, benefit the Debtors' unsecured creditors. The Plan generally contemplates that the proceeds from the Plan Trusts will be distributed to Classes of unsecured creditors in Classes 2 and 3 (including creditors in Classes 2A, 2B, 3A, and 3B).

(ii) Conclusions of Law

114. Section 1123(b)(3)(B) of the Bankruptcy Code provides that a plan may provide for the retention and enforcement, by the debtor or other appointed representative of the estate, of any claim or interest belonging to the debtor or to the estate.

115. Under section 1123(b)(3)(B) of the Bankruptcy Code, a party, other than the debtor or the chapter 11 trustee, which seeks to enforce a claim of the estate must show (1) that it has been appointed; and (2) that it is a representative of the estate. *McFarland v. Leyh* (*In re Texas Gen. Petroleum Corp.*) 52 F. 3d. 1330, 1335 (5th Cir. 1995) (citing *Citicorp Acceptance Co. v. Robinson* (*In re Sweetwater*) 884 F. 2d 1323, 1326-27 (10th Cir. 1989)). With respect to the second element, courts apply a case by case analysis. The primary concern is whether a

successful recovery by the appointed representative would benefit the debtor's unsecured creditors. *See generally, McFarland*, 52 F. 3d. 1330 (5th Cir. 1995) (liquidation trustee representative of the estate to pursue avoidance actions on behalf of debtor's unsecured creditors); *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279 (Bankr. S.D.N.Y. 1990) (trustee has standing as "representative of the estate" to pursue avoidable transfer claims against insiders of the debtor); *DuVoisin v. East Tennessee Equity Ltd. (In re Southern Ind. Banking Corp.)* 59 B.R. 638, 642 (Bankr. E.D. Tenn. 1986) (trustee of liquidation trust is a representative of the estate for purpose of pursuing fraudulent conveyance claims).

116. Courts in the Sixth Circuit have confirmed plans under which a trust was appointed as a representative of the estate under 11 U.S.C. § 1123(b)(3)(B) for purposes of pursuing claims on behalf of a chapter 11 debtor or its estate. *See, e.g., Belfance v. Pension Benefit Guaranty Corporation (In re CSC Ind., Inc. and Copperweld Steel Co.)*, 1997 Bankr. Lexis 2155 (Bankr. N.D. Ohio, 1997) (liquidation trustee, appointed as representative of the estate under 1123(b)(3)(B) pursuant to confirmed plan for purposes of, among other things, defending claims against the debtors); *DuVoisin v. East Tennessee Equity, Ltd. (In re Southern Ind. Banking Corp. d/b/a Daveco)*, 59 B.R. 638 (Bankr. E.D. Tenn., 1986) (trustee appointed under plan of reorganization had standing under 11 U.S.C. § 1123(b)(3)(B) to pursue claims and interests of the debtor).

117. The Plan Trust (acting through the Plan Trustee) and the EP Custodial Trust (acting through the Custodial Trustee) qualify as "representatives of the estate" under 11 U.S.C. § 1123(b)(3)(B) for all purposes under the Plan and the respective documents governing the respective trusts.

B. Section 1129(a)(2) – Eligibility of Proponent

1. Findings of Fact

118. Each of the Debtors is a corporation and is a proper debtor under section 109 of the Bankruptcy Code.

119. On the Petition Date, each of the Debtors filed a voluntary chapter 11 petition pursuant to section 301 of the Bankruptcy Code.

120. The Bankruptcy Court has jurisdiction over the Debtors' Bankruptcy Cases pursuant to 28 U.S.C. §§ 157 and 1334.

121. On April 22, 2005, the United States Trustee appointed the members of the Committee.

122. Venue in these cases is proper in this district pursuant to 28 U.S.C. § 1408.

123. The Debtors and the Committee are proper proponents of the Plan pursuant to section 1121(a) of the Bankruptcy Code.

124. As Plan proponents, the Debtors and the Committee have conducted themselves in accordance with chapter 11 of the Bankruptcy Code, including without limitation: (a) conducting the solicitation of votes on the Plan in a manner consistent with the Disclosure Statement Order; (b) obtaining approval of the Disclosure Statement; (c) complying with the Orders of the Bankruptcy Court; and (d) operating their businesses within the confines established by the Bankruptcy Code and the Orders of the Bankruptcy Court.

125. The Debtors, the Committee, the Lenders and their respective agents and professionals have acted in good faith within the meanings of sections 1125(e), 1126(e), and 1129(a)(3) of the Bankruptcy Code.

126. The Debtors have complied with all relevant provisions of the Bankruptcy Code, the Local Bankruptcy Rules and the specific rules of the Court throughout these Cases. No party

has objected to the Plan on this basis, and the Plan complies with the requirements of this section.

2. Conclusions of Law

127. Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "comply with the applicable provisions of [Title 11]." 11 U.S.C. § 1129(a)(2). The primary purpose of section 1129(a)(2) is to ensure that the plan proponents have complied with the disclosure requirements of section 1125 of the Bankruptcy Code in the solicitation of acceptances to the Plan. See *Tenn-Fla Partners v. First Union Nat'l Bank of Florida*, 229 B.R. 720, 733-34 (W.D. Tenn. 1999) (quoting *In re Trans World Airlines, Inc.*, 185 B.R. 302, 313 (Bankr. E.D. Mo. 1995).

128. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(2) of the Bankruptcy Code.

129. As set forth above, the Debtors have complied with the applicable provisions of the Bankruptcy Code, including the provisions addressing Plan disclosure and solicitation, thereby satisfying section 1129(a)(2) of the Bankruptcy Code.

C. Section 1129(a)(3) –Good Faith Requirements

1. Findings of Fact

130. The Plan is the product of extensive arms-length, open and honest negotiations among the Debtors and the Committee, and their respective legal and financial advisors. To a lesser extent, the Plan is also the product of negotiations with other constituencies, including certain state and federal environmental agencies.

131. The Plan was proposed and filed in order to reflect the results of these negotiations in accordance with the provisions of the Bankruptcy Code.

132. The Debtors' objectives in seeking chapter 11 relief and in proposing the Plan are twofold: (i) to preserve and protect the value of their businesses under chapter 11; and (ii) to maximize the value of property available for distribution to creditors.

133. Implementation of the Plan will maximize the value for the Debtors' creditors.

134. The Plan fairly achieves the overall reorganization of the debtors for the benefit of all creditors and Holders of Equity interests, a result consistent with the objectives and purposes of chapter 11.

2. Conclusions of Law

135. Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." Although the term "good faith" is not explicitly defined in the Bankruptcy Code, good faith may exist "when there is a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Dow Corning Corp.*, 244 B.R. 673, 675 (Bankr. E.D. Mich. 1999), (*quoting In re Nikron, Inc.*, 27 B.R. 773, 778 (Bankr. E.D. Mich. 1983). See also *Hanson v. First Bank of S.D.*, 828 F.2d 1310, 1315 (8th Cir. 1987) ("In the context of a chapter 11 reorganization . . . a plan is considered proposed in good faith 'if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code.") (*quoting In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984)); *In re Koelbl*, 751 F.2d 137, 139 (2d Cir. 1984) (must show that plan was proposed with "honesty and good intentions and with a basis for expecting that a reorganization can be effected"); *In re Stolrow's Inc.*, 84 B.R. 167, 172 (9th Cir. BAP 1988) (finding that good faith requires fundamental fairness in dealing with one's creditors).

136. Whether a plan is proposed in good faith must be determined based upon the totality of the circumstances surrounding the formulation of the plan. *See In re Laguna Assoc.*

Ltd. P'ship, 30 F.3d 734, 738 (6th Cir. 1994). A finding of absence of good faith usually requires "misconduct in the bankruptcy proceedings, such as fraudulent misrepresentations or serious nondisclosures of material facts to the court." *In re River Village Assocs.*, 161 B.R. 127, 140 (Bankr. E.D. Pa. 1993), aff'd, 181 B.R. 795 (E.D. Pa. 1995). Whether a plan is proposed in good faith must be determined based upon the totality of the circumstances surrounding the formulation of the plan. *Id.* (citing *In re Laguna Assoc. Ltd. P'ship*, 30 F.3d 734, 738 (6th Cir. 1994)).

137. Based upon the totality of the circumstances, the Plan was proposed in good faith, not by any means prohibited by law and satisfies section 1129(a)(3) of the Bankruptcy Code.

D. Section 1129(a)(4) – Professional Fees

1. Findings of Fact

138. All payments made by the Debtors, as proponents of the Plan, for services or for costs and expenses in or in connection with the Cases, or in connection with the Plan and incident to the Cases, have been approved by this Bankruptcy Court as reasonable or are subject to this Bankruptcy Court's approval, as reasonable.

139. The professionals in the Cases are subject to established procedures with respect to the filing and presentation of applications for fees and the reimbursement of costs and expenses. To date, the Debtors have paid such fees, costs and expenses only pursuant to these court-approved procedures.

140. Section 2.02 of the Plan sets forth a procedure for the continued reimbursement of costs and expenses for professionals after confirmation.

2. Conclusions of Law

141. Section 1129(a)(4) of the Bankruptcy Code provides that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

142. Section 1129(a)(4) requires that payments of professional fees "for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case" may be paid only after such payments either have been approved by the Bankruptcy Court as reasonable or are subject to approval of the Bankruptcy Court as reasonable. *See In re Eagle-Picher Indus.*, 203 B.R. 256, 274 (Bankr. S.D. Ohio 1996).

143. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(4) of the Bankruptcy Code.

144. The Plan satisfies the requirements of section 1129(a)(4) of the Bankruptcy Code.

E. Section 1129(a)(5) – Disclosure of the Identities and Compensation Arrangements for the Directors and Officers

1. Findings of Fact

145. The Plan does not contemplate reorganized Debtors[13] or successors but provides information concerning the Plan Trustee and Custodial Trustee, as well as the directors of New HoldCo.

146. The service of the Plan Trustee and the Custodial Trustee in the capacities provided for in the Plan is consistent with the interests of creditors and with public policy. Neither the Plan Trustee not the Custodial Trustee is an insider of the Debtor.

147. The directors of New HoldCo have been disclosed in the Plan Supplement. In addition, the Disclosure Statement provides information concerning officers and directors of

[13] Additionally, one or more officers or employees of the Debtors may continue service to the Debtors until dissolution for certain limited purposes, such as facilitating the transfer of environmental operating permits.

New HoldCo and the NewCos, including whether any such officer or director was as an "insider" of the Debtors for purposes of section 101((31) of the Bankruptcy Code.

2. Conclusions of Law

148. Under section 1129(a)(5)(A)(i) of the Bankruptcy Code, the proponent of a plan must disclose the "identity and affiliations" of any individual who, after confirmation, will serve as a director or officer of the debtor, any affiliate of the debtor participating in a joint plan, or a successor to the debtor under the plan. 11 U.S.C. § 1129(a)(5)(A)(i). Moreover, section 1129(a)(5)(A)(ii) requires that the service of such individuals be "consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1129(a)(5)(A)(ii). *See In re Apex Oil Co.*, 118 B.R. 683, 704-05 (Bankr. E.D. Mo. 1990) (section 1129(a)(5)(A)(ii) met where debtors as well as creditors' committee believe control of reorganized entity by proposed individuals will be beneficial to reorganized debtor).

149. Section 1129(a)(5)(B) of the Bankruptcy Code requires a plan to disclose the identity of any "insider" who will be employed or retained by the reorganized debtor and the "nature of any compensation" for such insider. *See In re Texaco, Inc.*, 84 B.R. at 893, (Bankr. S.D.N.Y. 1988) (section 1129(a)(5)(B) satisfied when plan discloses debtors' existing officers and directors who will continue to serve in office after confirmation); *see also Apex Oil Co.*, 118 B.R. at 704-05 (section 1129(a)(5)(B) satisfied where plan fully disclosed that certain individuals will be employed by reorganized debtor and the terms of employment of such insiders).

150. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(5) of the Bankruptcy Code.

151. The disclosures provided by the Debtors satisfy the requirements of sections 1129(a)(5)(A) and (B) of the Bankruptcy Code. Based upon this evidence, the Debtors have satisfied the requirements of section 1129(a)(5).

F. Section 1129(a)(6) – Regulated Rates

152. The Debtors do not conduct operations in a regulated industry, and section 1129(a)(6) of the Bankruptcy Code is therefore inapplicable to the Plan.

G. Section 1129(a)(7) – The Best Interests Test

1. Findings of Fact

153. The Debtors' liquidation analysis, attached as Exhibit E to the Disclosure Statement (the "Liquidation Analysis"), provides an estimate of the cash proceeds that may be realized from the liquidation of each Debtors' assets in a hypothetical chapter 7 liquidation. The Debtors, in consultation with Houlihan Lokey Howard & Zukin Capital ("HLHZ"), their financial advisor, have also formulated the Recovery Model, which establishes the pro rata recovery from Plan Consideration for creditors of each Debtor under the Plan.

154. The assumptions, judgments, and estimates contained in the Liquidation Analysis and the Recovery Model, including the allocation of the Secured debt (the "Secured Debt Allocation"), are grounded in applicable law and a thorough analysis of, among other things, the Debtors' historic operations and the claims against the Debtors as of the Petition Date. The Secured Debt Allocation is consistent with actual use of the funds by the Debtors.

155. No factual foundation or legal argument has been presented by U.S. EPA or Blue Tee in their Preliminary Objections or otherwise supporting the denial of approval of the Recovery Model or the appropriateness of any alternative to the Recovery Model.

156. The Debtors' proposed payment of the Administrative Claims under the Plan is reasonable, fair and consistent with the Debtors' Recovery Model.

157. All Classes of Creditors entitled to vote on the Plan have voted in favor of the Plan.

158. With respect to the members of each impaired Class of Creditors under the Plan, the "best interest of creditors" test is satisfied. A review of the Liquidation Analysis and the Recovery Model demonstrates that recoveries to be received by impaired creditors under the Plan are no less than the recoveries those creditors would receive under a chapter 7 liquidation.

2. Conclusions of Law

159. Section 1129(a)(7) of the Bankruptcy Code attempts to provide protection to creditors and interest holders who are impaired under a plan and who have not voted to accept such plan by imposing a "best interests of creditors" requirement. Under that requirement, holders of impaired claims and interests who do not vote to accept the plan must:

> [R]eceive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 [of the Bankruptcy Code] on such date.

11 U.S.C. § 1129(a)(7) (A)(ii).

160. The best interests test focuses on individual dissenting creditors rather than classes of claims. The analysis requires that each holder of a claim or interest either accept the plan or receive or retain under the plan property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code. *In re Dow Corning Corp.*, 255 B.R. 445, 499 (E.D. Mich. 2000) ("Section 1129(a)(7)(A)(ii) ensures that the dissenting claimants receive in payment of their claims no less than what they would receive if the debtor were liquidated under chapter 7"). *See also, In re Future Energy Corporation*, 83 B.R. 470, 489 (Bankr. S.D. Ohio 1988).

161. Accordingly, if the Bankruptcy Court finds that each non-consenting member of an impaired class will receive at least as much under the Plan as it would receive in a chapter 7

liquidation, the Plan satisfies the best interests of creditors test. *See In re Montgomery Court Apts. Ltd.*, 141 B.R. 324, 331 (Bankr. S.D. Ohio 1992).

162. An exercise to determine what an impaired, non-consenting class member will receive in a hypothetical chapter 7 liquidation of a corporation is necessarily replete with assumptions and judgments. *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 290 (Bankr. S.D.N.Y. 1990). *See also In re MCorp Fin., Inc.*, 137 B.R. 219, 228 (Bankr. S.D. Tex. 1992) (the process of determining the hypothetical liquidation value is neither an exact science nor the product of mere calculations). In undertaking analyses in the context of the best interests of the creditors test, courts attach great importance to business and economic principles. *See, e.g. In re Exide Technologies, et al.*, 303 B.R. 48 (Bankr. D. Del. 2003).

163. As provided in the Initial Objection Order, the assumptions, judgments, and estimates contained in the Liquidation Analysis and the Recovery Model, including the Secured Debt Allocation, are reasonable and well supported by the facts, economic principles, and the opinion of the Debtors and their advisors. Creditors will not receive less under these models than they would in a chapter 7 liquidation. *See In re Kentucky Lumber Co.* 860 F.2d 674 (6th Cir. 1988).

164. The Court has expressly determined in the Initial Objection Order that the Recovery Model and the allocation of the Secured debt under the Plan meet the "best interests of the creditors" test set forth in section 1129(a)(7) of the Bankruptcy Code.

H. Section 1129(a)(8) – Acceptance by Impaired Classes

1. Findings of Fact

165. Each of the unimpaired Classes of Claims under the Plan, and each holder of a Claim in such Classes (Class 1), are conclusively deemed to have accepted the Plan and, in

accordance with section 1126(f) of the Bankruptcy Code, solicitations of acceptance with respect to each such Class is not required.

166. All Classes of Claims entitled to vote on the Plan (Classes 2C – 2F and Classes 3C-3F) have voted to accept the Plan.

167. Classes 2A, 2B, 3A, 3B and 4 receive no distribution under the Plan, are conclusively deemed to have rejected the Plan, and, in accordance with section 1126(g) of the Bankruptcy Code, solicitations of acceptance with respect to each such Class is not required.

2. Conclusions of Law

168. Section 1129(a)(8) of the Bankruptcy Code generally requires that a plan either provide for the non-impairment of claims and interests or be accepted by all impaired classes unless the provisions of section 1129(b) are satisfied. 11 U.S.C. § 1129(a)(8)(A).

169. Notwithstanding non-compliance with section 1129(a)(8) of the Bankruptcy Code, the Bankruptcy Court may confirm the Plan if it satisfies the requirements of section 1129(b) of the Bankruptcy Code with respect to non-accepting Classes and satisfies the other requirements of section 1129(a) of the Bankruptcy Code.

170. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(8) of the Bankruptcy Code.

171. The Debtors have not satisfied the requirements of section 1129(a)(8) of the Bankruptcy Code, and instead must satisfy section 1129(b).

I. Section 1129(a)(9) – Treatment of Priority Claims

1. Findings of Fact

172. Article 2 of the Plan provides for full payment in Cash of all Allowed Administrative Claims and Allowed Priority Claims, unless a holder of such Claim has agreed to an alternative treatment for such Claim.

173. Section 2.01 of the Plan provides that holders of any allowed Administrative Claim of the kind specified in section 503(b) of the Bankruptcy Code will receive Cash (or as otherwise agreed to by the administrative claimant) on the Distribution Date, on the date such Claim becomes allowed, or on the terms agreed to between the Debtor and the administrative claimant, pursuant to a contract or otherwise.

174. There are no Claims in the Cases under sections 507(a)(2) and 502(f) of the Bankruptcy Code.

175. Pursuant to section 2.04 of the Plan, in accordance with section 1129(a)(9)(C), Priority Tax Claims will be paid in cash over a six-year period after the Effective Date.

176. Pursuant to section 2.05 of the Plan, priority Claims of the type specified under sections 507(a)(3)and 507(a)(4) of the Bankruptcy Code and all other types of priority Claims set forth in section 507(a) of the Bankruptcy Code will be paid on the Distribution Date or such later date as such claims become due and payable.

177. The Debtors have demonstrated that they have sufficient Cash to fund the payment of the Claims entitled to priority pursuant to section 1129(a)(9) of the Bankruptcy Code.

2. Conclusions of Law

178. Section 1129(a)(9) of the Bankruptcy Code mandates certain treatment of claims entitled to priority under the Bankruptcy Code. *See In re Eagle-Picher Indus., Inc.*, 1996 U.S. Dist. LEXIS 17160 (S.D. Ohio 1996).

179. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(9) of the Bankruptcy Code.

180. The Plan meets the requirements under section 1129(a)(9) of the Bankruptcy Code for the treatment of claims arising under section 507(a) of the Bankruptcy Code.

J. Section 1129(a)(10) – Acceptance by at Least One Impaired Class

1. Findings of Fact

181. As set forth above, the Debtors' classification scheme for claims and Equity Interests contained in the Plan is reasonable and complies with the requirements of the Bankruptcy Code.

182. Each and every voting impaired Class (Classes 2C-2F and Classes 3C-3F) has voted to accept the Plan.

2. Conclusions of Law

183. If a plan has any impaired class of claims, section 1129(a)(10) of the Bankruptcy Code requires that at least one such impaired class of claims vote to accept the plan, determined without regard to the acceptance of the plan by any insider. *See In re Crosscreek Apts., 213 B.R. 521, 533 (Bankr. E.D. Tenn. 1997).*

184. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(10) of the Bankruptcy Code.

185. Because the Plan has been accepted by all the impaired Classes entitled to vote thereon, the Plan complies with section 1129(a)(10) of the Bankruptcy Code.

K. Section 1129(a)(11) – Feasibility

1. Findings of Fact

186. The Disclosure Statement contains projections for New HoldCo and the NewCos for fiscal years ending November 31, 2006 through 2009 (the "Projected Financials"). The Projected Financials demonstrate that, given reasonably estimated expenses and income, and taking into account cash reserves, the Debtors will be able to satisfy their obligations under the Plan.

187. The Projected Financials and the assumptions underlying them are realistic and reasonable and are supported by the evidence adduced prior to the Confirmation Hearing, including the analysis and opinions of the Debtors' financial advisors.

188. Section 5.07 of the Plan provides that on the Effective Date, the Debtors may exercise their option to convert the Senior Replacement DIP Facility, in the original principal amount of $220,000,000.00, into the Senior Exit Facility and to convert the Junior Replacement DIP Facility, in the original, principal amount of $50,000,000.00 into the Junior Exit Financing Facility. These Exit Financing Facilities, or any alternative exit facility, shall provide, among other things, working capital for New HoldCo and the NewCos in the form of, respectively, (a) a revolving credit facility and a synthetic letter of credit facility and (b) a term loan.

189. The terms of the Exit Financing Facilities are reasonable and appropriate and were negotiated at arms-length and in good faith by the Debtors and the Lenders under such facilities.

190. The capital and debt structure, and the business plans of New HoldCo and the NewCos provide the new companies with a sound financial and economic structure going forward that should support the value attributed to the common stock of New HoldCo that is being distributed under the Plan.

191. The Debtors proposed $900,000 and $45,000 as the Funding amounts to be provided to the EP Custodial Trust (the "Proposed Ohio Funding Amounts") in connection with the Sidney Site and Urbana Site, respectively.

192. U.S. EPA proposed alternate Funding amounts for each of the Ohio Sites in the Agency SOW (the "Agency Proposed Ohio Funding Amounts").

193. Neither the State of Ohio nor Ohio EPA filed any objection to the Debtors' Proposed Funding amount or any other confirmation issue.

194. EaglePicher Incorporated is the owner of both of the Ohio Sites.

195. Pursuant to the June 13 Order, the Court made findings of fact and conclusions of law with respect to the portion of the Funding required to be made by the Debtors with respect to the Ohio Sites. The June 13 Order and the findings of fact and conclusions of law contained therein is incorporated by reference herein in full.

196. Based upon the foregoing, the Plan is realistic, reasonable and capable of being implemented. Confirmation of the Plan is not likely to result in the need for further reorganization or liquidation.

2. Conclusions of Law

197. Section 1129(a)(11) of the Bankruptcy Code requires a finding that a plan is feasible as a condition precedent to confirmation. Specifically, the Bankruptcy Court must determine that:

> [C]onfirmation of the plan is not likely to be followed by liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. § 1129(a)(11).

198. Pursuant to the feasibility test set forth in section 1129(a)(11), the Bankruptcy Court must determine whether the plan offers a "reasonable prospect of success" and is workable. *In re Montgomery Court Apts. of Ingham Co., Ltd.*, 141 B.R. 324, 331 (Bankr. S.D. Ohio 1992); *In re Sugarhouse Realty, Inc.*, 192 B.R. 355, 366 (E.D. Pa. 1996). That Bankruptcy Code provision requires only a probability of success, not a guarantee of success. *In re U.S. Truck Co.*, 47 B.R. 932, 944 (E.D. Mich. 1985), *aff'd*, 800 F.2d 581 (6th Cir. 1986) ("[f]easibility does not, nor can it, require the certainty that a reorganized company will

succeed"); *Montgomery Court*, 141 B.R. at 331 ("Although more is required than mere hopes and desires, success need not be certain or guaranteed."); *In re Made in Detroit, Inc.*, 299 B.R. 170 , 176 (Bankr. E.D. Mich. 2003) ("The plan does not need to guarantee success, but it must present reasonable assurance of success") (*citing Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988)).

199. The key element of feasibility is whether the assumptions underlying the plan are realistic and reasonable, and are capable of being met. *See In re Ridgewood Apts. of Dekalb Co., Ltd.*, 183 B.R. 784, 789 (Bankr. S.D. Ohio 1995); *In re Eddington Thread Mfg. Co.*, 181 B.R. 826, 833 (Bankr. E.D. Pa. 1995) ("[A] plan satisfies [§ 1129(a)(11)] so long as there is a reasonable prospect for success and a reasonable assurance that the proponents can comply with the terms of the plan"); *see also In re Clarkson*, 767 F.2d 417, 420 (8th Cir. 1985) (court stating that the feasibility test contemplates the probability of actual performance of the provisions of the plan; the test is whether the things which are to be done after confirmation can be done as a practical matter) (quotation omitted).

200. The purpose of the feasibility test is to protect against visionary or speculative plans:

> ...a court cannot confirm a visionary scheme that promises creditors more than the debtor can possibly attain after confirmation, notwithstanding the proponent's sincerity, honesty, and willingness to make a best efforts attempt to perform according to the terms of the plan.

Mallard Pond, 217 B.R. at 785 (citations omitted). *See also Ridgewood Apts.*, 183 B.R. at 789; *Made in Detroit*, 299 B.R. at 176; *Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (quoting 5 Collier on Bankruptcy section 1129.02[11], at 1129-34 (15th ed. 1998)).

201. The Blue Tee Objection contained a statement that Blue Tee believes the amounts for the Funding contained in the Disclosure Statement were so underestimated that the Custodial Trusts will not be able to conduct the necessary remediation which would result in the insolvency of the NewCos, and on that basis objected to the Plan on the grounds that the Plan was not feasible. Blue Tee did not file any additional pleadings with respect to the actual Funding proposed by the Debtors that exceed those proposed in the Disclosure Statement (Doc. No. 2029), nor did Blue Tee appear at the Final Confirmation Hearing or propose any evidence to support is objection to feasibility. The Debtors did not seek confirmation on the basis of the estimated Funding provided in the Disclosure Statement which formed the grounds for the Blue Tee Objection. The Blue Tee Objection is overruled.

202. The EP Custodial Trust is a good faith effort to protect public health and safety by means not forbidden by applicable law. In fact, U.S. EPA has supported the use of such a trust in other bankruptcy cases. *See In re Phillips Services Corporation,* Case No. 03-37718-H2-11 (S.D. Texas).

203. Pursuant to the June 13 Order, the Bankruptcy Court has determined that the Ohio Sites shall be funded as follows: (a) the Urbana Site - $45,000 and (b) the Sydney Site - $1,080,000. By causing the Funding of the Ohio Sites in such amounts, together with the amounts set forth in paragraph 71(h) hereof with respect to the Designated Property and Transitional Property located in the States of Kansas, Oklahoma, Illinois and Michigan, the Debtors will satisfy section 5.12(c) of the Plan.

204. The record before the Bankruptcy Court establishes that the Plan is feasible. Accordingly, the Plan satisfies the requirements of section 1129(a)(11) of the Bankruptcy Code.

L. Section 1129(a)(12) –Payment of Certain Fees

1. Findings of Fact

205. Section 1129(a)(12) of the Bankruptcy Code requires that certain fees listed in 28 U.S.C. § 1930, determined by the Bankruptcy Court at the hearing on confirmation of a plan, be paid or that provision be made for their payment. 11 U.S.C. § 1129(a)(12).

206. The Plan provides that such fees constitute Administrative Claims and to the extent (if any) not previously paid, will be paid in full in cash on the Effective Date. The Plan Trustee will continue to make all payments required under 28 U.S.C. § 1930 until the case is closed or as may be agreed.

2. Conclusions of Law

207. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(12) of the Bankruptcy Code.

208. The Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

M. Section 1129(a)(13) – Satisfaction of Retiree Benefits

1. Findings of Fact

209. During the Cases, the Debtors have complied with, and continue to comply with, the provisions of their employee benefit plans.

210. The Plan generally provides that these benefit plans will be assumed and assigned to New HoldCo and the NewCos, who will likewise continue the employee benefit plans, as modified and/or revised by agreement between the parties, for the retirees after confirmation.

2. Conclusions of Law

211. Section 1129(a)(13) of the Bankruptcy Code requires that the plan provide for the continuation of retiree benefits at established levels consistent with section 1114 of the Bankruptcy Code, for the duration of the period that the debtor has obligated itself to provide such benefits.

212. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(a)(13) of the Bankruptcy Code.

213. Because the Plan provides for the continuation of retiree medical benefits at their existing levels, the Plan complies with the requirements of section 1129(a)(13) of the Bankruptcy Code.

N. Section 1129(b) – Confirmation Without Acceptance by One or More Impaired Classes ("Cram Down")

1. Findings of Fact

214. As set forth above, the Plan satisfies all applicable provisions of section 1129(a) of the Bankruptcy Code other than section 1129(a)(8) of the Bankruptcy Code.

215. The Plan can be confirmed without acceptance by Classes 2A, 2B, 3A, 3B and 4, provided that the Plan meets the so-called "cram-down requirements" of section 1129(b) of the Bankruptcy Code.

a. The Plan Does Not Discriminate and is Fair and Equitable with Respect to Classes 2A, 2B, 3A, 3B, and 4

216. The Plan does not discriminate against holders of Claims or Equity Interest in Classes deemed to have rejected the Plan under 11 U.S.C. § 1126(g).

217. The creditors in Classes 2A, 2B, 3A, 3B and 4 represent all of the deemed rejecting impaired creditors. No similar creditors are placed in other Classes. No similar creditors receive a recovery under the Plan.

218. Thus, under the Plan's Recovery Model, the treatment of Classes 2A, 2B, 3A, and 4 is fair and equitable. No party objected to confirmation of the Plan on this basis.

b. The Plan Recovery Model is Consistent with EPI's Primary Obligation to Repay the Secured Debt

219. The primary allocation of Secured debt to EPI under the Plan Recovery Model is fair and equitable because it is consistent with applicable law and the Debtors' business practices.

220. The Secured debt originated under the August 7, 2003 Credit Agreement among EPI, EPH and, *inter alia*, Harris Trust and Savings Bank as Administrative Agent (the "Pre-Petition Credit Agreement"). EPI was the sole borrower under the Pre-Petition Credit Agreement. All of the other Debtors, including Holdings, were joint and several guarantors (the "Guarantors") of EPI's obligations pursuant to an August 7, 2003 Guarantee and Collateral Agreement (the "Pre-Petition Guarantee").

221. Primary allocation of the Secured debt to EPI is consistent not only with the terms of the instrument creating the obligation to repay the Secured debt (i.e., the Pre-Petition Credit Agreement) but also the pre-petition business practices of the Debtors and their secured lenders. EPI is the only Debtor that ever made payments of principal, interest, fees, expenses or other amounts to the agent under the Pre-Petition Credit Agreement.

222. Such allocation is also consistent with the use of the funds. EPI used the funds available under the term loan of the Pre-Petition Credit Agreement to repay indebtedness incurred by EPI in a leveraged buyout in 1998. None of the term loan facility was used by EPI for any other purpose or by the other Debtors.

223. EPI used most of the funds available under the revolving credit facility of the Pre-Petition Credit Agreement to invest in joint ventures and to acquire an EPI subsidiary, both of which are majority owned by EPI and neither of which is a Debtor.

224. Any residual "benefit" that may have been received by a non-EPI Debtor from the use of the borrowed funds under the Pre-Petition Credit Agreement is reflected in the pro rata allocation of the Secured debt to them above the amount of EPI's assets (the "Deficiency").

225. The Plan Recovery Model allocates the Deficiency among the non-EPI Debtors pro rata, based on the value of their assets as of the assumed Effective Date of the Plan.

226. Such allocation is fair and equitable and no party has objected to the Recovery Model on this basis.

227. Allocating the Secured debt to any of the other Debtors before exhausting EPI's assets is contrary to New York law and the other Debtors' rights under the credit instrument to be enforced against them.

c. Based Upon the Recovery Model, the Plan is Fair and Equitable for Cram Down Purposes

228. The treatment of Classes 2A and 3A in the Plan Recovery Model is not discriminatory and is fair an equitable under section 1129(b) of the Bankruptcy Code.

229. Holdings' sole asset is 100% of the common stock of EPI. EPI is insolvent. Thus, the value of Holdings' assets is $0. Therefore, the Plan properly makes no distribution to holders of Claims in Classes 2A and 3A.[14]

230. The only junior Class under the Plan is Class 4 and holders of Equity Interests in Class 4 likewise will not receive any distributions under the Plan.

231. With respect to Classes 2B and 3B (holders, respectively, of Pre-Petition Note Claims and Other Unsecured Claims against EPI), consistent with the Recovery Model,

[14] The Plan does provide that holders of Claims in Class 2A and 2B are entitled to receive pro rata distributions of any Estate Cause of Action Recoveries. Because all holders of Claims in these classes will receive the identical treatment with respect to any such recoveries, the Plan does not discriminate at all (let alone unfairly) and is fair and equitable.

following payment of all senior claims, there is no remaining asset value at EPI to make any distributions to holders of Claims in Classes 2B and 3B. Therefore, the Plan properly makes no distribution to holders of Claims in Classes 2B and 3B.[15]

232. The only junior Class under the Plan is Class 4 and holders of Equity Interests in Class 4 likewise will not receive any distributions under the Plan. The treatment of Classes 2B and 3B is not discriminatory and is fair an equitable under section 1129(b) of the Bankruptcy Code.

233. Because each of the Debtors is insolvent, the Equity Interests (in Class 4), which consist of the common stock of each Debtor, are worthless. The Plan therefore makes no distribution to holders of Equity Interests in Class 4.

234. There is no junior Class to Class 4.

235. The treatment of Class 4 is not discriminatory and is fair an equitable under section 1129(b) of the Bankruptcy Code.

236. The Recovery Model is fully supported by the Committee, which represents the interests of all unsecured creditors of the Debtors and which includes creditors of EPI.

237. Distribution under the Plan is straightforward and distributes the value of each Debtor to its creditors in strict conformity with the absolute priority rule. Unsecured creditors of each Debtor receive identical pro rata treatment of their Claims based on the value of the applicable Debtor's assets.

[15] The Plan does provide that holders of Claims in Class 3A and 3B are entitled to receive pro rata distributions of any Estate Cause of Action Recoveries and any Residual Interests. Because all holders of Claims in these classes will receive the identical treatment with respect to any such recoveries, the Plan does not discriminate at all (let alone unfairly) and is fair and equitable.

238. Based on the above factors, the Plan's Recovery Model forms a proper and compelling basis for determining that the Plan satisfies the cram down requirements of section 1129(b) of the Bankruptcy Code.

2. Conclusions of Law

239. Section 1129(b) provides that, if a plan of reorganization satisfies all of the requirements of section 1129(a) other than section 1129(a)(8) (requiring all impaired classes to accept the plan), a plan may be confirmed without such class's affirmative acceptance of the plan if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan" (the so-called "cram down" criteria) 11 U.S.C. §1129(b)(1).

240. The cram-down criteria require that an impaired class that rejects a plan must be treated fairly and equitably, and must "receive treatment which allocates value to the class in a manner consistent with the treatment afforded to the other classes with similar legal claims against the debtor." 5 Collier on Bankruptcy 1129.03[3] [b] at 1129-81 (Lawrence P. King ed., 15th ed. 1996). *See* 11 U.S.C. § 1129(b)(1); *In re Montgomery Court Apts., Ltd.*, 141 B.R. 324, 346 (Bankr. S.D. Ohio 1992).

241. Section 1129(b)(2) sets forth criteria for determining whether a plan is fair and equitable with respect to an impaired dissenting class. With respect to a dissenting class of unsecured creditors, the condition that a plan be fair and equitable requires either that (a) each claimant in that class receive a distribution equal to the allowed amount of its claim, ***or*** that (b) no junior class of claim or interest receive or retain on account of such junior claim or interest any property (the so-called "absolute priority rule"). 11 U.S.C. § 1129(b)(2)(B).

242. In analyzing the "fair and equitable" requirement under section 1129(b)(2), however, mere compliance with the absolute priority rule does not guarantee that the plan is fair

and equitable. To satisfy this standard, the plan must treat the dissenting classes fairly and not unduly shift the risk of reorganization to the dissenting classes. *See In re Montgomery Court*, 141 B.R. at 331; *In re Rivers End Apartments, Ltd.*, 167 B.R. 470, 486 (Bankr. S.D. Ohio 1994).

243. The Plan does not discriminate against the Holders of Claims and Equity Interests in the deemed rejecting Classes. The Plan affords all the creditors and Equity Holders in each of these Classes the same treatment – no recovery. No similarly-situated creditors have been placed in other Classes or receive a recovery under the Plan. Because they receive no recovery, the Plan does not unduly shift the risk of reorganization to the deemed rejecting Classes.

244. In addition, the primary allocation of Secured debt to EPI under the Plan Recovery Model is fair and equitable because it is consistent with applicable law and the Debtors' business practices.

245. No party objected to confirmation of the Plan on the basis of failure to comply with section 1129(b) of the Bankruptcy Code.

246. For these reasons, the Plan meets the "cram-down" requirements set forth under section 1129(b) of the Bankruptcy Code.

O. Substantive Consolidation of Hillsdale Entities

1. Findings of Fact

247. The Plan will be implemented in part through the substantive consolidation of Debtors EaglePicher Automotive, Inc., Daisy Parts, Inc., and Carpenter Enterprises Limited (collectively, the "Hillsdale Debtors"). (Plan § 5.08.)

248. The Hillsdale Debtors are centrally managed as a single automotive group comprised of different plants. The three legal entities have nearly identical officers, who operate and manage the Hillsdale Debtors as one integrated business without regard to separate corporate

formalities. While each of the Hillsdale Debtors has its own board of directors, the boards are all comprised of the same core group of individuals.

249. The Hillsdale Debtors maintain uniform letterhead, logos, building signage, invoices, business cards, and checks and have centralized, rather than individual, purchasing and accounting systems.

250. Revenues for each of the Hillsdale Debtors are treated as though they were a single entity, and their profits and losses are consolidated. They do not generate individual financial statements.

251. At the request of the Debtors at the outset of these chapter 11 cases (and without opposition by any party in interest), the Bankruptcy Court approved the submission of a consolidated list of Hillsdale Debtors' top 50 creditors, and consolidated schedules, and the Office of the United States Trustee approved the filing of consolidated Hillsdale Debtors' monthly operating reports, because the Hillsdale Debtors represented the sheer impossibility of untangling the assets and liabilities of each of the Hillsdale Debtors, and in creating separate financial statements.

252. Tracing certain of the Hillsdale Debtors' assets back to each of the individual legal entities would be cost prohibitive, if it were even possible. Moreover, the product of such an analysis would not be reliable and likely would not be accurate.

253. The substantive consolidation of the Hillsdale Entities will have the following effects:

(a) The chapter 11 cases of the Hillsdale Debtors shall be consolidated into the case of as a single consolidated case. All property of the estate of each Hillsdale Debtor shall be deemed to be property of the consolidated Hillsdale Debtors.

(b) All claims against each of the Hillsdale Debtor's estates shall be deemed to be claims against the consolidated Hillsdale Debtors' estate, all proofs of claim filed against one or more of the Hillsdale Debtors shall be deemed to be a single claim filed against the consolidated Hillsdale Debtors' estate, and all duplicate proofs of claim for the same claim filed against more than one of the Hillsdale Debtors Debtor shall be deemed expunged.

(c) No Distributions under the Plan shall be made on account of Intercompany claims by and among the Hillsdale Debtors and such Intercompany Claims shall not be treated or affected by the Plan.

(d) All equity interests owned by one Hillsdale Debtor in an affiliate shall remain outstanding after the Confirmation Date and shall not be affected by the Plan.

(e) Except as specifically provided herein, all guarantees by one Hillsdale Debtor in favor of any other Hillsdale Debtors shall be eliminated, and no Distributions under this Plan shall be made on account of claims based upon such guarantees.

(f) For purposes of determining the availability of the right of setoff under section 553 of the Bankruptcy Code, the Hillsdale Debtors shall be treated as one consolidated entity so that, subject to the other provisions of section 553, debts due to any of Hillsdale Debtors may be set off against the debts of any other of Hillsdale Debtors.

(g) Substantive consolidation shall not merge or otherwise affect the separate legal existence of (a) each Hillsdale Debtor for licensing, regulatory or other purposes, other than with respect to Distribution rights under this Plan and (b) of Debtors other than the Hillsdale Debtors.

(h) Substantive consolidation shall have no effect on valid, enforceable and unavoidable liens, except for liens that secure a Claim that is eliminated by virtue of substantive consolidation and liens against collateral that are extinguished by virtue of substantive consolidation. Substantive consolidation shall not impair or adversely affect in any respect any of the liens, claims, rights, priorities, protections and remedies granted under the Replacement DIP Order, the Senior Replacement DIP Facility, the Junior Replacement DIP Facility or the Senior or Junior Exit Financing Facilities.

(i) Substantive consolidation shall not have the effect of creating a Claim in a Class different from the Class in which a Claim would have been placed in the absence of substantive consolidation.

(j) Substantive consolidation shall not effect any applicable date(s) for purposes of pursuing any avoidance actions or other actions reserved to the Hillsdale Debtors pursuant to the Plan.

(k) Substantive consolidation shall not impact or otherwise affect provisions in the Plan, if any, which provide that specific entities comprising the Hillsdale Debtors shall be liable on specific obligations under the Plan.

254. Substantive consolidation of the Hillsdale Debtors' assets and liabilities would be administratively expedient, is a condition precedent to confirmation of the Plan, and would cause no harm to any party.

255. No party has objected to the Plan on this basis and substantive consolidation of the Hillsdale Debtors is appropriate and proper.

2. Conclusions of Law

256. Substantive consolidation of the Hillsdale Debtors' assets and liabilities is justified under all of the prevailing legal analyses and is in the best interests of the creditors as a whole.

257. The equitable doctrine of substantive consolidation permits a court in a bankruptcy case involving one or more related corporate entities, in appropriate circumstances, to disregard their separate corporate identities to consolidate and pool their assets and liabilities, and treat them as though held and incurred by one entity. *See Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966). *See also, White v. Creditors Serv. Corp.*, 195 B.R. 680, 684 (Bankr. S.D. Ohio 1996). "Substantive consolidation is employed in cases where the interrelationships of the debtors are hopelessly obscured and the time and expense necessary

to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all the creditors.'" *American Homepatient*, 298 B.R. at 152, 165 (MD TN 2003), (quoting *First Nat'l Bank of Barnesville v. Rafoth (In re Baker & Getty Fin. Servs.)*, 974 F.2d 712, 720 (6th Cir. 1992).

258. Substantive consolidation creates a single estate for the benefit of all creditors of all the consolidated corporations and combines such creditors into one creditor body. *See Stone v. Eacho (In re Tip Top Trailers, Inc.)*, 127 F.2d 284, 289 (4th Cir.), *cert. denied*, 317 U.S. 635 (1942). Courts have invoked their broad equity power to order substantive consolidation after reviewing the facts on a case-by-case basis in light of the guidelines gleaned from prior case law. *See American Homepatient*, 298 B.R. at 166; *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 59 (2d Cir. 1992) (authority for substantive consolidation is [found] in bankruptcy court's general equitable powers); *Fish v. East*, 114 F.2d 177, 191 (10th Cir. 1940); *In re Vecco Constr. Indus.*, 4 B.R. 407, 409 (Bankr. E.D. Va. 1980).

259. To determine whether substantive consolidation of debtor entities is appropriate, courts generally have looked to two, highly fact-specific analyses. *See In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518 (2nd Cir. 1988); *In re Auto-Train Corp., Inc.*, 810 F.2d 270 (D.C. Cir. 1987). In *Augie/Restivo*, the Second Circuit considered two critical factors to determine if substantive consolidation was appropriate: (1) whether creditors dealt with entities as a single economic unit and did not relay on their separate identity when extending credit; and (2) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors. *In re Augie/Restivo Baking Co.*, 860 F.2d at 518. Alternatively, the *Auto-Train* test requires that the proponent of substantive consolidation must first prove that (1) there is a substantial identity between the entities to be consolidated, and (2) substantive consolidation is necessary to avoid

some harm or realize some benefit. *Id.* If both elements are satisfied, the burden shifts to the objecting creditors to prove that (1) the creditors actually relied on the separate credit of one of the entities; and (2) the creditors will be prejudiced in some way as a result of the consolidation. If the creditors satisfy their burden, then the court may only approve substantive consolidation if the benefits of such action heavily outweigh the harms.

260. Ultimately, however, decisions regarding substantive consolidation are fact intensive and made on a case by case basis. *In re Eagle-Picher Industries, Inc.* 192 B.R. 903, 905 (S.D. Ohio 1996). In *In re Eagle-Picher*, this Bankruptcy Court, applying both the *Augie/Restivo* and the *Auto-Train* tests, concluded the debtors met their burden of proving that substantive consolidation of a parent debtor entity and a subsidiary debtor entity was appropriate under the facts. *In re Eagle-Picher Industries, Inc.* 192 B.R. 903 (S.D. Ohio 1996).[16]

261. The facts and circumstances present in the instant Cases support the substantive consolidation of the Hillsdale Debtors under both the *Auto-train* and the *Augie/Restivo* tests, as applied in *In re Eagle-Picher Industries, Inc.*.

P. Other Plan Provisions

1. Assumption or Rejection of Executory Contracts and Unexpired Leases

a. Findings of Fact

262. Article 10 of the Plan sets forth provisions relating to the Debtors' assumption or rejection of their executory contracts and unexpired leases. This article also contains procedures for the determination and payment of cure amounts for assumed contracts or leases, and sets a

[16] After analyzing the facts under both the *Augie/Restivo* test and the *Auto-train* test, the Court concluded that, for their immediate purposes, these two alternative tests "are not materially different..." *In re Eagle-Picher*, 192 B.R. at 905.

bar date for the filing of all proofs of claim relating to contracts or leases the Debtors have decided to reject.

263. Except as otherwise provided in Article 10 of the Plan, all unexpired leases and executory contracts of the Debtors not expressly rejected by the Debtors on or prior to the Confirmation Date (or which rejection is pending as of the Confirmation Date) will be deemed assumed.

264. Pursuant to section 10.02 of the Plan, the Debtors will also assume, and assign to New HoldCo and the NewCos, their indemnification obligations to their officers, directors and employees (the "Indemnification Obligations").

265. Pursuant to section 5.14 of the Plan, on and after the Effective Date, unless rejected pursuant to section 10.04 of the Plan,[17] the Debtors will assume, and assign to New HoldCo and the NewCos, all of their prepetition employment and severance policies and all compensation and benefit plans, policies and programs applicable generally to their respective employees or retirees, including, without limitation, all savings plans, retirement plans, health care plans, disability plans, incentive plans, and life, accidental death and dismemberment insurance plans (collectively the "Employee Plans"), in accordance with sections 365 and 1123 of the Bankruptcy Code.

266. The Employee Plans shall be assumed and assigned subject to any modifications negotiated by the parties or ordered by the Bankruptcy Court pursuant to section 1114 of the Bankruptcy Code.

267. The Debtors have executed sound business judgment in determining whether to (a) assume or reject each of their executory contracts and unexpired leases; (b) assume and

[17] The Debtors have no present intention of rejecting any collective bargaining agreement or employee benefit plan.

assign the Indemnification Obligations; and (c) assume and assign the Employee Plans. The executory contracts and unexpired leases to be assumed by the Debtors are valuable components of the continuing business and will contribute to a successful rehabilitation

268. In accordance with section 10.04 of the Plan, the Debtors have properly filed as exhibits to the Plan Supplement, and have served on affected parties in accordance with section 10.01 of the Plan, schedules of the executory contracts and unexpired leases to be rejected (the "Schedule of Rejected Contracts").

b. Conclusions of Law

269. Assumption and assignment of the executory contracts and unexpired leases, in accordance with Article 10 of the Plan, is authorized and approved under sections 365(a) and (e) of the Bankruptcy Code.

270. Courts have consistently deferred to the business judgment of the debtor-in-possession in determining whether assumption is in the debtor's best interest. *See, e.g., In re Orion Pictures Corp.*, 4 F.3d 1095, 1098-99 (2d Cir. 1993), *cert. dismissed*, 511 U.S. 1026 (1994); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311-12 (5th Cir. 1985) (a debtor can assume a lease under its "original, pre-bankruptcy terms . . . so long as such an assumption is a valid exercise of a debtors' business judgment"; A "[m]ore exacting scrutiny would slow the administration of the debtors' estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially"); *In re Buckhead America Corp.*, 180 B.R. 83, 88 (D. Del. 1995) (business judgment is standard for approving assumption or rejection).

271. The Bankruptcy Court's authorization and approval of assumption and assignments of executory contracts under Article 10 of the Plan extends to the Employee Plans. Courts have determined that, subject to section 1114 of the Bankruptcy Code, prepetition

employee benefit plans may be generally treated as "executory contracts" for purposes of assumption under section 365(a) of the Bankruptcy Code. *See, General Datacomm Inds., Inc. v. Arcara, et al. (In re General Datacomm Inds., Inc.)* 407 F.3d 616 (3rd Cir. 2005); *In re North American Royalties, Inc., et al.*, 276 B.R. 860, 865 (Bankr. E.D. Tenn. 2002). The decision to assume or reject these plans should be based on the economic benefit to the debtor and its creditors. *See In Re North American Royalties*, 276 B.R. at 865. A chapter 11 trustee may also sell or assign such an executory contract pursuant to section 365(f) of the Bankruptcy Code. *Id.* Section 1114 of the Bankruptcy Code, which prohibits a debtor-in-possession from unilaterally modifying or terminating a retiree benefit plan absent an agreement by the parties or court order, is inapplicable by its terms to the Debtors' intended assumption and assignment of the Benefit Plans. *See 11 U.S.C. § 1114; Id.; See also, In re North American Royalties*, 276 B.R. at 862.

272. The Debtors' assumption of the Employee Plans, and their assignment of those agreements to New HoldCo and the NewCos, are subject to the same "business judgment standard" as is described above in connection with the assumption or rejection of the Debtors' other executory contracts and unexpired leases. *See In re Orion Pictures Corp.*, 4 F.3d at 1099. The Debtors failure to assume and assign the Benefit Plans may result in unanticipated delays or expenses for its programs due to potential dissatisfaction and/or loss of employees. Thus, the Debtors' assumption of the Employee Plans, and the assignment thereof to New HoldCo and the NewCos, is in the best interests of the Debtors' estates and their creditors.

273. The assumption or rejection of any executory contracts or unexpired leases, including the Indemnity Agreements and the Employee Plans, and the assignment of such assumed contracts or leases to New HoldCo or a NewCo, pursuant to Article 10 of the Plan and the Schedule of Rejected Contracts, shall be legal, valid and binding upon the applicable Debtor,

NewCo and all non-Debtor parties to the executory contract or unexpired lease, all to the same extent as if the assumption or rejection had been effectuated pursuant to an order of the Bankruptcy Court entered before the Confirmation Date.

2. Assumption and/or Assignment of Collective Bargaining Agreements

a. Findings of Fact

274. Approximately 50 percent of EaglePicher's employees are union employees, most of who are employed pursuant to collective bargaining agreements (the "CBAs") between certain of the Debtors and each of, among others. the United Auto Worker, the United Steel Workers of America and the International Brotherhood of Teamsters ("Teamsters"). The remaining employees, which include salaried employees and non-union hourly employees, are not covered by CBAs.

275. The Plan provides that the prepetition CBA's (the "Prepetition CBAs") will be assumed and assigned by each Debtor to the applicable NewCo. A list of the Prepetition CBAs to be assumed is attached as Exhibit A to the Notice of Intent to Assume and Assign Collective Bargaining Agreements in Connection with Plan of Reorganization (doc. no 1759), filed by the Debtors on March 28, 2006.

276. Debtor EPFM is also a party to a CBA with the Teamsters one CBA with the Teamsters, dated May 31, 2005, relating to EPFM's operations in Lovelock, Nevada (the "Postpetition CBA"), which EPFM entered into, after the Petition Date, in the ordinary course of its business.

277. Pursuant to the Plan, the Postpetition CBA will be assigned to New EP Filtration & Minerals. LLC, even though the Postpetition CBA contains no provisions either restricting or allowing assignment of that agreement.

b. Conclusions of Law

278. The Bankruptcy Court for the Southern District of Ohio has held that 11 U.S.C. § 1113 provides the exclusive means for a debtor-in-possession to assume or reject a collective bargaining agreement. In *In re Ormet*, 316 B.R. 662, 664 (Bankr. S.D. Ohio 2004). Specifically, section 1113(a) of the Bankruptcy Code provides that a trustee or debtor-in-possession may assume or reject a collective bargaining agreement, only in accordance with the provisions of that section. However, the remaining subsections of section 1113 deal exclusively with rejection and modification of collective bargaining agreements, not assumption. *Amer. Flint Glass Workers Union v. Anchor Resolution Corp.* (*In re Anchor Resolution Corp.*), 231 B.R. 559, 564 (D. Del 1999).[18] The purpose of section 1113 is to erect formidable barriers to the modification and termination (including rejection) of such an agreement. *See In re Sunarhauserman, Inc.*, 184 B.R. 279, 281 (Bankr. N.D. Ohio 1995).

279. Because the prepetition CBAs will not be rejected, but will be assumed and assigned in their prepetition form, or subject only to consensual modifications agreed upon by the parties, the Debtors' assumption of the prepetition CBAs complies with section 1113(a) of the Bankruptcy Code.

280. Section 1113 of the Bankruptcy Code is not applicable to collective bargaining agreements entered into by the debtor-in-possession or trustee during the postpetition period. *See In re The Leslie Fay Cos., Inc.*, 168 B.R. 294, 301 (Bankr. S.D.N.Y. 1994) (absent specific language to the contrary, section 1113 should apply only to pre-petition collective bargaining

[18] Section 1113(b) of the Bankruptcy Code sets out a specific process that a debtor-in-possession or trustee must follow before it may reject a CBA. 11 U.S.C. § 1113(b). Section 1113(c) lists requirements for court approval of such a proposed rejection. 11 U.S.C. § 1113(c). Section 1113(d) provides a time frame for the approval of the proposed rejection. 11 U.S.C. § 1113(d). Subsections 1113(e) and 1113(f) pertain only to termination or alteration of collective bargaining agreements. 11 U.S.C. §§ 1113(e)-(f); *see also In re Anchor Resolution Corp.* 231 B.R. at 564.

agreements). Further, the Postpetition CBA itself is silent with respect to terms of transfer to successors or assigns.

281. However, courts have interpreted the National Labor Relations Act, 29 U.SC. § 151, *et seq.*, the statute governing the administration and interpretation of collective bargaining agreements, to support the position that the Debtors should be able to formally assign the Postpetition CBA, without interference from the Teamsters, provided such agreement is binding in its entirety. *See e.g., Southward v. South Central Ready Mix Supply Corp.*, 7 F.3d 487 (6th Cir. 1993); *Peters v. NLRB*, 153 F.3d 289 (6th Cir. 1988).

282. Thus, the Debtors are permitted to assign the Postpetition CBA to EaglePicher Filtration & Minerals, LLC, as contemplated in the Plan.

3. Plan Documents

a. Findings of Fact

283. The Debtors, Plan Trust, EP Custodial Trust, New HoldCo and/or the NewCos, as the case may be, have exercised sound business judgment in determining to enter into various documents necessary to effectuate the Plan, including but not limited to, the Purchase Agreements, the Plan Trust Agreement, the Custodial Trust Agreement, the Exit Financing Agreements and other documents contained in the Plan Supplement or designated as Plan Exhibits and such other agreements, documents and instruments contemplated by the Plan, Plan Trust Agreement, Custodial Trust Agreement, Purchase Agreements and the Exit Financing Agreements and the transactions contemplated thereby (collectively, the "Plan Documents") on the terms and in the form set forth therein.

284. The Plan Documents are essential elements of the Plan and entry into the Plan Documents, as determined by the Bankruptcy Court in the Confirmation Order, is in the best interests of the Debtors, their Estates and creditors.

285. The Debtors have provided sufficient and adequate notice of the Plan Documents to all parties in interest in the Cases.

286. The Plan Documents have been negotiated at arm's length and in good faith and without intent to hinder, delay or defraud the Debtors, New HoldCo or the NewCos or any of their respective creditors.

b. Conclusions of Law

287. The Plan Documents are valid, binding and enforceable and not in conflict with any federal or state law.

288. The Plan Documents, all exhibits, documents and agreements included in the Plan Supplement and the execution, delivery and performance of the Plan Documents, exhibits, documents and agreements in substantially the form included in the Plan Supplement in accordance with their respective terms are hereby approved in all respects.

289. The consummation of the Plan and the execution, delivery and performance of the Plan Documents shall not result in or constitute a fraudulent transfer under any applicable federal or state law.

4. Other Transfers Under the Plan

a. Findings of Fact

290. Pursuant to section 6.02 of the Plan, the Debtors, in order to provide for the Distributions in Sections 4.02 of the Plan and otherwise in accordance with the Plan Trust Agreement, shall transfer and assign to the Plan Trust for the benefit of the Plan Trust Beneficiaries, the Initial Plan Trust Assets on or before the Effective Date and, from time to time thereafter, Future Plan Trust Assets (together with the Initial Plan Trust Assets, the "Plan Trust Assets") including Plan Consideration to be distributed in accordance with the terms of the Plan on the Effective Date.

PREPARED BY:

Stephen D. Lerner (OH 0051284)
Scott A. Kane (OH 0068839)
P. Casey Coston (MI 49871)
Kenneth R. Craycraft, Jr. (OH 0074253)
SQUIRE, SANDERS & DEMPSEY L.L.P
312 Walnut Street, Suite 3500
Cincinnati, Ohio 45202
Telephone: 513.361.1200
Facsimile: 513.361.1201
E-mail: slerner@ssd.com
skane@ssd.com
ccoston@ssd.com
kcraycraft@ssd.com
ATTORNEYS FOR
DEBTORS AND DEBTORS-IN-POSSESSION

CINCINNATI/56547

###